110 pp

# MONTANA LEGISLATIVE HISTORY

Chapter 88 1997

Bill H _____ S 106 Original bill & history ✓ C

| H. Committee on Judiciary | | | S. Committee on Judiciary | | |
|---|---|---|---|---|---|
| Hearing Date(s) | Mar 04 | C | Hearing Date(s) | Jan 14 | ✓ C |
| rereferred to Corrections Select Committee | Mar 07 | C | | Jan 20 | ✓ C |
| | | C | | | C |
| | | C | | | C |
| Date Out | | C | | | |

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

| | | | |
|---|---|---|---|
| 3/13 | TRANSMITTED TO GOVERNOR | | |
| 3/19 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 87 | | |
| | EFFECTIVE DATE: 10/01/97 | | |

SB 104 INTRODUCED BY BECK, ET AL. *LC0193 DRAFTER: MALY*

AUTHORIZE THE DEPARTMENT OF COMMERCE TO REVIEW THE BOOKS AND AFFAIRS OF BANK HOLDING COMPANIES

BY REQUEST OF DEPARTMENT OF COMMERCE

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|---|---|---|---|
| 1/01 | INTRODUCED | | |
| 1/03 | REFERRED TO STATE ADMINISTRATION | | |
| 1/06 | FIRST READING | | |
| 1/14 | HEARING | | |
| 1/24 | COMMITTEE REPORT—BILL PASSED AS AMENDED | | |
| 1/27 | 2ND READING PASSED | 50 | 0 |
| 1/28 | 3RD READING PASSED | 49 | 0 |
| | TRANSMITTED TO HOUSE | | |
| 1/29 | FIRST READING | | |
| 1/29 | REFERRED TO BUSINESS & LABOR | | |
| 3/07 | HEARING | | |
| 3/07 | COMMITTEE REPORT—BILL CONCURRED | | |
| 3/14 | 2ND READING CONCURRED | 90 | 9 |
| 3/15 | 3RD READING CONCURRED | 86 | 13 |
| | RETURNED TO SENATE | | |
| 3/19 | SIGNED BY PRESIDENT | | |
| 3/21 | SIGNED BY SPEAKER | | |
| 3/21 | TRANSMITTED TO GOVERNOR | | |
| 3/25 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 148 | | |
| | EFFECTIVE DATE: 10/01/97 | | |

SB 105 INTRODUCED BY BECK *LC0605 DRAFTER: CAMPBELL*

REQUIRE A LOW-VOLTAGE ELECTRICIAN'S LICENSE FOR PERSONS WIRING FOR, INSTALLING, AND REPAIRING LIFE AND PROPERTY PROTECTION EQUIPMENT

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|---|---|
| 1/01 | INTRODUCED |
| 1/03 | REFERRED TO BUSINESS & INDUSTRY |
| 1/03 | FISCAL NOTE REQUESTED |
| 1/06 | FIRST READING |
| 1/10 | FISCAL NOTE RECEIVED |
| 1/14 | FISCAL NOTE PRINTED |
| 3/03 | MISSED DEADLINE FOR 45TH DAY TRANSMITTAL |
| | DIED IN COMMITTEE |

SB 106 INTRODUCED BY VAN VALKENBURG *LC0266 DRAFTER: MACMASTER*

REVISE DRIVING UNDER THE INFLUENCE LAWS WITH RESPECT TO THE TESTS USED TO DETECT, ESTIMATE, AND MEASURE ALCOHOL OR DRUGS, OR BOTH, IN A PERSON'S BODY

BY REQUEST OF DEPARTMENT OF JUSTICE

| | |
|---|---|
| 1/01 | INTRODUCED |
| 1/03 | REFERRED TO JUDICIARY |
| 1/03 | FISCAL NOTE REQUESTED |
| 1/06 | FIRST READING |
| 1/12 | FISCAL NOTE RECEIVED |
| 1/13 | FISCAL NOTE PRINTED |
| 1/14 | HEARING |

| | | | |
|---|---|---|---|
| 1/21 | COMMITTEE REPORT—BILL PASSED AS AMENDED | | |
| 1/23 | 2ND READING PASSED | 29 | 20 |
| 1/24 | 3RD READING PASSED | 29 | 19 |
| | TRANSMITTED TO HOUSE | | |
| 1/25 | FIRST READING | | |
| 1/25 | REFERRED TO JUDICIARY | | |
| 2/14 | TAKEN FROM COMMITTEE | | |
| 2/14 | REREFERRED TO CORRECTIONS SELECT COMMITTEE | | |
| 3/04 | HEARING | | |
| 3/11 | COMMITTEE REPORT—BILL CONCURRED | | |
| 3/12 | 2ND READING CONCURRED | 83 | 15 |
| 3/13 | 3RD READING CONCURRED | 85 | 15 |
| | RETURNED TO SENATE | | |
| 3/14 | SIGNED BY PRESIDENT | | |
| 3/15 | SIGNED BY SPEAKER | | |
| 3/17 | TRANSMITTED TO GOVERNOR | | |
| 3/19 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 88 | | |
| | EFFECTIVE DATE: 10/01/97 | | |

SB 107 INTRODUCED BY BECK *LC0192 DRAFTER: STERNBERG*

REVISE CERTAIN PROVISIONS REGARDING AGRICULTURAL COMMODITY STANDARDS, STORAGE, AND MERCHANDISING

BY REQUEST OF DEPARTMENT OF AGRICULTURE

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|---|---|---|---|
| 1/01 | INTRODUCED | | |
| 1/03 | REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION | | |
| 1/03 | FISCAL NOTE REQUESTED | | |
| 1/06 | FIRST READING | | |
| 1/12 | FISCAL NOTE RECEIVED | | |
| 1/14 | FISCAL NOTE PRINTED | | |
| 1/17 | HEARING | | |
| 1/21 | COMMITTEE REPORT—BILL PASSED AS AMENDED | | |
| 1/23 | 2ND READING PASSED | 47 | 2 |
| 1/24 | 3RD READING PASSED | 48 | 0 |
| | TRANSMITTED TO HOUSE | | |
| 1/25 | FIRST READING | | |
| 1/25 | REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION | | |
| 2/06 | HEARING | | |
| 2/12 | COMMITTEE REPORT—BILL CONCURRED | | |
| 3/05 | 2ND READING CONCURRED | 99 | 1 |
| 3/06 | 3RD READING CONCURRED | 100 | 0 |
| | RETURNED TO SENATE | | |
| 3/10 | SIGNED BY PRESIDENT | | |
| 3/12 | SIGNED BY SPEAKER | | |
| 3/13 | TRANSMITTED TO GOVERNOR | | |
| 3/17 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 76 | | |
| | EFFECTIVE DATE: 07/01/97 | | |

SB 108 INTRODUCED BY BECK *LC0214 DRAFTER: COLHOUN*

REVISE WATER ADJUDICATION LAWS

BY REQUEST OF MONTANA WATER ADJUDICATION ADVISORY COUNCIL

| | |
|---|---|
| 1/01 | INTRODUCED |
| 1/03 | REFERRED TO NATURAL RESOURCES |
| 1/03 | FISCAL NOTE REQUESTED |
| 1/06 | FIRST READING |

# 1997 LEGISLATIVE HISTORY

The 1997 Montana Legislature has dramatically changed the nature of the legislative minutes. Specifically, the minutes from House committees are extremely sparse in content, offering no substantive information from which to glean legislative intent. The Senate committees' minutes are somewhat fuller in content. Exhibits available from the State Law Library (which may include written statements, attendant information, roll call votes, roll call attendance, a list of public members present, specific action taken on legislative bills, etc.) are included with this request. For information on other exhibits, contact the Montana Historical Society Archives at 444-4774. Exhibits may also be purchased on a CD-ROM from the Montana Legislative Council (444-3064).

Just as in the 1995 legislative session, the House and Senate hearings were recorded. The Historical Society is the depository for the tapes. For information on accessing the tapes, call the archives at 444-4774.

If you have concerns over the format of the 1997 legislative minutes, it is suggested that you contact your state legislators.

SENATE BILL NO. 106

INTRODUCED BY VAN VALKENBURG

BY REQUEST OF THE DEPARTMENT OF JUSTICE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING DRIVING UNDER THE INFLUENCE LAWS WITH RESPECT TO THE TESTS USED TO DETECT, ESTIMATE, AND MEASURE ALCOHOL OR DRUGS, OR BOTH, IN A PERSON'S BODY; AUTHORIZING ADMISSION OF PRELIMINARY ALCOHOL SCREENING TEST RESULTS AND PHYSICAL, PSYCHOMOTOR, AND PHYSIOLOGICAL ASSESSMENTS OF ALCOHOL OR DRUG PRESENCE OR IMPAIRMENT IN DRIVING UNDER THE INFLUENCE AND OTHER PROCEEDINGS, INCLUDING CERTAIN CRIMINAL PROSECUTIONS AND CIVIL PROCEEDINGS IN WHICH ALCOHOL OR DRUG-PRESENCE OR IMPAIRMENT IS AT ISSUE; ELIMINATING USE OF URINE TESTING UNDER THE IMPLIED CONSENT LAW; PERMITTING SUBMISSION OF CERTIFIED, RATHER THAN SWORN, STATEMENTS FROM PEACE OFFICERS CONCERNING TESTING REFUSALS; AUTHORIZING USE OF BLOOD OR BREATH ANALYSIS TEST RESULTS IN CERTAIN CRIMINAL PROSECUTIONS AND CIVIL ACTIONS; AND AMENDING SECTIONS 61-8-401, 61-8-402, 61-8-404, 61-8-405, 61-8-407, 61-8-409, 61-8-805, AND 61-8-806, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 61-8-401, MCA, is amended to read:

"**61-8-401. Persons under the influence of alcohol or drugs.** (1) It is unlawful and punishable, as provided in 61-8-714, ~~and 61-8-723~~ for ~~any~~ a person who is under the influence of:

(a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;

(b) a dangerous drug to drive or be in actual physical control of a vehicle within this state;

(c) any other drug to drive or be in actual physical control of a vehicle within this state; or

(d) alcohol and any dangerous or other drug to drive or be in actual physical control of a vehicle within this state.

(2) The fact that any person charged with a violation of subsection (1) is or has been entitled to use alcohol or ~~such~~ a drug under the laws of this state does not constitute a defense against any charge

of violating subsection (1).

(3) "Under the influence" means that as a result of taking into the body alcohol, drugs, or any combination ~~thereof~~ of alcohol and drugs, a person's ability to safely operate a motor vehicle has been diminished.

(4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person at the time ~~alleged~~ of a test, as shown by analysis of a sample of the person's blood~~, urine,~~ or breath drawn or taken within a reasonable time after the alleged act, ~~shall give~~ gives rise to the following inferences:

(a) If there was at that time an alcohol concentration of ~~0.05~~ 0.04 or less, it may be inferred that the person was not under the influence of alcohol.

(b) If there was at that time an alcohol concentration in excess of ~~0.05~~ 0.04 but less than 0.10, that fact ~~shall~~ may not give rise to any inference that the person was or was not under the influence of alcohol, but ~~such~~ the fact may be considered with other competent evidence in determining the guilt or innocence of the person.

(c) If there was at that time an alcohol concentration of 0.10 or more, it may be inferred that the person was under the influence of alcohol. The inference is rebuttable.

(5) The provisions of subsection (4) do not limit the introduction of any other competent evidence bearing upon the issue of whether the person was under the influence of alcohol, drugs, or a combination of ~~the two~~ alcohol and drugs.

(6) Each municipality in this state is given authority to enact 61-8-406, 61-8-408, 61-8-410, 61-8-714, 61-8-722, and subsections (1) through (5) of this section, with the word "state" in 61-8-406 and subsection (1) of this section changed to read "municipality", as an ordinance and is given jurisdiction of the enforcement of the ordinance and of the imposition of the fines and penalties ~~therein~~ provided in the ordinance.

(7) Absolute liability as provided in 45-2-104 will be imposed for a violation of this section."

**Section 2.** Section 61-8-402, MCA, is amended to read:

**"61-8-402. Blood~~,~~ or breath~~, or urine~~ tests for alcohol, drugs, or both.** (1) A person who operates or is in actual physical control of a vehicle upon ways of this state open to the public is considered to have

given consent~~, subject to the provisions of 61-8-401,~~ to a test or tests of the person's blood~~,~~ or breath~~,~~ ~~or urine~~ for the purpose of determining any measured amount or detected presence of alcohol or drugs in the person's body if arrested by a peace officer for driving or for being in actual physical control of a vehicle while under the influence of alcohol, drugs, or a combination of ~~the two~~ alcohol and drugs. The test or tests must be administered at the direction of a peace officer who has reasonable grounds to believe that the person has been driving or has been in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two. The arresting officer may designate which test or tests are administered. ~~A test for alcohol must be given first, whether or not that test also tests for drugs, and if the test shows an alcohol concentration of 0.10 or more, a test for drugs may not be given.~~

(2) A person who is unconscious or who is otherwise in a condition rendering the person incapable of refusal is considered not to have withdrawn the consent provided by subsection (1).

(3) If ~~a driver under arrest~~ an arrested person refuses ~~upon the request of a peace officer~~ to submit to ~~a test or~~ one or more tests requested and designated by the arresting officer as provided in subsection (1), ~~a~~ the refused test or tests may not be given, but the officer shall, on behalf of the department, immediately seize the person's driver's license. The peace officer shall immediately forward the license to the department, along with a ~~sworn~~ report certified under penalty of law noting that the peace officer had reasonable grounds to believe that the arrested person had been driving or was in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of ~~the two~~ alcohol and drugs and noting that the person refused to submit to ~~the test or~~ one or more tests ~~upon the request of~~ requested and designated by the peace officer. Upon receipt of the report, the department shall suspend the license for the period provided in subsection (5).

(4) Upon seizure of a driver's license, the peace officer shall issue, on behalf of the department, a temporary driving permit, which is valid for 5 days following the date of issuance and shall provide the driver with written notice of the license suspension or revocation and the right to a hearing provided in 61-8-403.

(5) The following suspension and revocation periods are applicable upon refusal to submit to ~~a test or~~ one or more tests:

(a) upon a first refusal, a suspension of 6 months with no provision for a restricted probationary license;

(b) upon a second or subsequent refusal within 5 years of a previous refusal, as determined from the records of the department, a revocation of 1 year with no provision for a restricted probationary license.

(6) A nonresident driver's license seized under this section must be sent by the department to the licensing authority of the nonresident's home state with a report of the nonresident's refusal to submit to ~~a test or~~ one or more tests.

(7) The department may recognize the seizure of a license of a tribal member by a peace officer acting under the authority of a tribal government or an order issued by a tribal court suspending, revoking, or reinstating a license or adjudicating a license seizure if the actions are conducted pursuant to tribal law or regulation requiring alcohol or drug testing of motor vehicle operators and the conduct giving rise to the actions occurred within the exterior boundaries of a federally recognized Indian reservation in this state. Action by the department under this subsection is not reviewable under 61-8-403.

(8) ~~All suspensions are~~ A suspension under this section is subject to review as provided in this part.

(9) This section does not apply to blood and breath tests, samples, and analyses used for purposes of medical treatment or care of an injured motorist or related to a lawful seizure for a suspected violation of an offense not in this part."

**Section 3.** Section 61-8-404, MCA, is amended to read:

"**61-8-404. Evidence admissible -- conditions of admissibility.** (1) Upon the trial of ~~any~~ a criminal action or other proceeding arising out of acts alleged to have been committed by ~~any~~ a person in violation of 61-8-401, ~~or~~ 61-8-406, 61-8-410, or 61-8-805:

(a) evidence of any measured amount or detected presence of alcohol, ~~or~~ drugs, or a combination of alcohol and drugs in the person at the time of the act alleged, as shown by an analysis of the person's blood, or breath, ~~or urine,~~ is admissible. A positive test result does not, in itself, prove that the person was under the influence of a drug or drugs at the time the person was in control of a motor vehicle. A person may not be convicted of a violation of 61-8-401 based upon the presence of a drug or drugs in the person unless some other competent evidence exists that tends to establish that the person was under the influence of a drug or drugs while driving or in actual physical control of a motor vehicle within this state.

(b) a report of the facts and results of ~~any test or~~ one or more tests of a person's blood, or breath, ~~or urine administered under 61-8-402~~ is admissible in evidence if:

(i) ~~the~~ a breath test or preliminary alcohol screening test was performed by a person certified by

the forensic sciences division of the department to administer ~~breath tests or~~ the test;

(ii) ~~the~~ a blood ~~or urine test~~ sample was ~~a laboratory analysis and the analysis was done~~ analyzed in a laboratory operated or certified by the department ~~or by any other~~ or in a laboratory ~~or facility certified or~~ exempt from certification under the rules of the department~~; and~~

~~(iii) the test was on a blood sample, the person withdrawing~~ and the blood was withdrawn from the person by a person competent to do so under 61-8-405(1).

(c) a report of the facts and results of a physical, psychomotor, or physiological assessment of a person is admissible in evidence if it was for alcohol and was made by a person trained by the department or if it was for drugs and was made by a person certified by the department.

(2) If the person under arrest refused to submit to ~~the test or~~ one or more tests as provided in this section, proof of refusal is admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle upon the ways of this state open to the public, while under the influence of alcohol, drugs, or a combination of ~~the two~~ alcohol and drugs.

(3) The provisions of this part do not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, drugs, or a combination of ~~the two~~ alcohol and drugs."

**Section 4.** Section 61-8-405, MCA, is amended to read:

"**61-8-405. Administration of tests.** (1) Only a physician or registered nurse, or other qualified person acting under the supervision and direction of a physician or registered nurse ~~acting~~, may, at the request of a peace officer, ~~may~~ withdraw blood for the purpose of determining any measured amount or detected presence of alcohol, drugs, or any combination of alcohol and drugs in the person. This limitation does not apply to the ~~taking~~ sampling of breath ~~or urine specimens~~.

(2) ~~The person may, at the person's own expense, have a physician or registered nurse of the person's own choosing administer a test, in~~ In addition to any test administered at the direction of a peace officer, a person may request that an independent blood sample be drawn by a physician or registered nurse for the purpose of determining any measured amount or detected presence of alcohol, ~~or~~ drugs, or any combination of alcohol and drugs in the person ~~at the time alleged, as shown by analysis of the person's blood, breath, or urine~~. The cost of an independent blood test is the sole responsibility of the person

requesting the test. The failure or inability to obtain an ~~additional~~ independent test by a person does not preclude the admissibility in evidence of ~~the~~ any test ~~or tests taken~~ given at the direction of a peace officer.

(3) Upon the request of the person tested, full information concerning ~~the~~ any test ~~or tests taken~~ given at the direction of the peace officer must be made available to the person or the person's attorney.

(4) A physician or registered nurse, or other qualified person acting under the supervision and direction of a physician or registered nurse, does not incur any civil or criminal liability as a result of the proper administering of a blood test when requested in writing by a peace officer to administer a test.

~~(5) If a test given under 61-8-402 or 61-8-806 is a test of urine, the person tested must be given privacy in the taking of the urine specimen that will ensure the integrity of the specimen and, at the same time, maintain the dignity of the individual involved.~~

~~(6)~~(5) The department in cooperation with any appropriate agency shall adopt uniform rules for the giving of tests and may require certification of training to administer the tests as considered necessary."

**Section 5.** Section 61-8-407, MCA, is amended to read:

"**61-8-407. Definition of alcohol concentration.** For purposes of 16-6-305~~, 61-8-401, and 61-8-406~~ and this chapter, "alcohol concentration" means either grams of alcohol per 100 milliliters of blood~~,~~ or grams of alcohol per 210 liters of breath~~, or grams of alcohol per 75.3 milliliters of urine~~."

**Section 6.** Section 61-8-409, MCA, is amended to read:

"**61-8-409. Preliminary alcohol screening test.** (1) A person who operates or is in actual physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a preliminary alcohol screening test of the person's breath, for the purpose of estimating the person's alcohol concentration, upon the request of a peace officer who has a particularized suspicion that the person was driving or in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol or in violation of 61-8-410.

~~(2) The results of a screening test may be used for determining whether probable cause exists to believe a person has violated 61-8-401, 61-8-406, or 61-8-410.~~

~~(3)~~(2) The person's obligation to submit to a test under 61-8-402 is not satisfied by the person submitting to a preliminary alcohol screening test pursuant to this section.

~~(4)~~(3) The peace officer shall inform the person of the right to refuse the test and that the refusal

to submit to the preliminary alcohol screening test will result in the suspension or revocation for up to 1 year of that person's driver's license.

~~(5)~~(4) If the person refuses to submit to a test under this section, a test will not be given. However, the refusal is sufficient cause to suspend or revoke the person's driver's license as provided in 61-8-402.

~~(6)~~(5) A hearing as provided for in 61-8-403 must be available. The issues in the hearing must be limited to determining whether a peace officer had a particularized suspicion that the person was driving or in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol or in violation of 61-8-410 and whether the person refused to submit to the test.

~~(7)~~(6) The provisions of 61-8-402(2) through (7) that do not conflict with this section are applicable to refusals under this section. If a person refuses a test requested under 61-8-402 and this section for the same incident, the department may not consider each a separate refusal for purposes of suspension or revocation under 61-8-402.

~~(8)~~(7) A test may not be conducted or requested under this section unless both the peace officer and the instrument used to conduct the preliminary alcohol screening test have been certified by the department pursuant to rules adopted under the authority of 61-8-405~~(6)~~(5)."

**Section 7.** Section 61-8-805, MCA, is amended to read:

"**61-8-805. Suspension for operating a commercial vehicle with alcohol concentration of 0.04 or more -- hearing.** (1) A person whose alcohol concentration is 0.04 or more while the person drives or is in actual physical control of a commercial motor vehicle is subject to the suspension of the person's commercial driver's license. If the department receives a ~~sworn~~ report certified under penalty of law from a peace officer that the person was operating a commercial motor vehicle while the person's alcohol concentration was 0.04 or more, the department shall suspend the person's commercial driver's license:

(a) for 1 year, with no provision for a restricted probationary license or endorsement, upon receipt of the first report, except that if the offense occurred in a commercial motor vehicle transporting hazardous materials, the suspension must be for 3 years; and

(b) for life, with no provision for a restricted probationary license or endorsement, upon receipt of a second or subsequent report at any time as determined from the records of the department, unless a restricted license or endorsement is allowed by federal rules governing commercial drivers.

(2) A peace officer who determines that a commercial motor vehicle operator has any measured

amount or detected presence of alcohol in the operator's body while operating a commercial motor vehicle shall place the commercial motor vehicle operator out of service as mandated by federal regulations for 24 hours.

(3) The fact that any person charged with a violation of the provisions of subsection (1) is entitled to use alcohol under the laws of Montana is not a defense against any charge of violating the provisions of subsection (1).

(4) The department shall immediately notify in writing any person whose commercial driver's license is suspended under this section. The person may file a petition within 30 days after the notice is given for a hearing in the matter in the district court in the county in which the finding of alcohol concentration was made. The court has jurisdiction and shall set the matter for hearing upon 10 days' written notice to the county attorney of the county in which the appeal is filed. The county attorney shall represent the state. The court shall take testimony and examine the facts of the case, except that the issue is limited to whether the person was driving or had actual physical control of a commercial motor vehicle while the person's alcohol concentration was 0.04 or more. The court shall determine whether the petitioner is entitled to a commercial driver's license or is subject to suspension as provided in this section. The provisions of 61-8-404 apply to any proceedings under this section."

**Section 8.** Section 61-8-806, MCA, is amended to read:

**"61-8-806. Blood~~,~~ and breath~~, or urine~~ tests of commercial vehicle operators -- procedure -- suspension.** (1) A person who operates a commercial motor vehicle upon the ways of this state open to the public is considered to have given consent~~, subject to the provisions of 61-8-401 and 61-8-805,~~ to a ~~test~~ one or more tests of the operator's blood~~,~~ or breath~~, or urine~~ for the purpose of determining any measured or detected amount of alcohol in the operator's body if the operator is requested to submit to the test or tests by a peace officer having reasonable grounds to believe the person to have been driving or in actual physical control of a commercial motor vehicle upon the ways of this state open to the public while having any measurable or detectable alcohol concentration. The peace officer may designate ~~a~~ the blood~~,~~ or breath~~, or urine~~ test or tests to be administered.

(2) A person who is unconscious or who is otherwise incapable of refusal is considered not to have withdrawn the consent provided in subsection (1).

(3) If a commercial motor vehicle operator who is a resident of Montana refuses upon the request

of a peace officer to submit to ~~a test~~ one or more tests designated by the officer as provided in subsection (1), the test or tests may not be given. On behalf of the department, the officer shall immediately seize the person's commercial driver's license and forward the license to the department, along with a ~~sworn~~ report certified under penalty of law that the officer had reasonable grounds to believe that the person had been driving or was in actual physical control of a commercial motor vehicle upon ways of this state open to the public while having any measurable or detectable alcohol concentration and that the person had refused to submit to ~~the test~~ one or more tests upon the request of the officer. Upon receipt of the report, the department shall suspend the license for a period provided in subsection (5).

(4) Upon seizure of a resident's commercial driver's license, the peace officer shall issue, on behalf of the department, a temporary noncommercial driving permit. The temporary driving permit is valid for 72 hours after issuance.

(5) If a commercial motor vehicle operator refuses to submit to ~~a test~~ one or more tests as provided in subsection (3), the department shall suspend the operator's commercial driver's license:

(a) upon first refusal, for 1 year, with no provision for a restricted probationary license or endorsement, except that if the offense occurred in a commercial motor vehicle transporting hazardous materials, the suspension for a first refusal must be for 3 years;

(b) upon a second or subsequent refusal at any time as determined from the records of the department, for life, with no provision for a restricted probationary license or endorsement unless allowed by federal rules governing commercial drivers.

(6) A nonresident commercial motor vehicle operator who refuses to submit to ~~a test~~ one or more tests as provided in subsection (3) is subject to suspension by the department as provided in subsection (5) and must be given a temporary driving permit as provided in subsection (4)."

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0106, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:
A bill to revise driving under the influence laws with respect to the tests used to detect, estimate, and measure alcohol or drugs, or both, in a person's body.

ASSUMPTIONS:
1. Currently law enforcement is conducting an average of 7500 breath test analyses statewide. These are done with an intoxilyzer. The Department of Justice, Forensic Science Division receives an average of 886 blood/alcohol requests from law enforcement per year. The average total of tests conducted by law enforcement is 8386 per year. If 5 percent of these were analyzed for drugs at the request of law enforcement, the Forensic Science Division would be running tests on 420 cases (8386 x 5% = 420).
2. In order to complete one analysis for drugs the average staff personnel time is nine hours. With 420 cases to run and nine hours per case, if all cases were run individually it would take 3780 hours (420 cases x 9 hours = 3780). The lab is able to batch runs, saving staff time by approximately one half. An additional 1.00 FTE, grade 17, would be needed to handle this work load with personal service costs of $50,628 per year.
3. All 420 cases would be tested by the lab for volatiles and emit drug screen at $15 per case or $6,300 (420 x $15). A study completed at the Forensic Science Division shows approximately 40 percent of the alcohol tests run by law enforcement have other drugs on board. To further test 40 percent of the 420 cases there is a cost of $155 per case (420 x 40% = 168, and 168 x $155 = $26,040). The total cost would be $32,340 ($6,300 + $26,040) for testing.
4. Operating expenses for the additional 1.00 FTE are estimated at $2,500 (telephone, supplies, and travel).
5. The analysis to be performed requires the following instruments: Gas Chromatograph NPD (GC/NPD), Gas Chromatograph MS (GC/MS), and a Syva Emit. The lab is currently using its GC/NPD and GC/MS to full capacity; therefore, new equipment would have to be purchased: GC/NPD = $48,000 and GC/MS = $85,000.
6. The Motor Vehicle Division would need $550 for printing of forms as required by this bill each year of the biennium.

FISCAL IMPACT:

| Forensic Science Division: Expenditures: | FY98 Difference | FY99 Difference |
|---|---|---|
| FTE | 1.00 | 1.00 |
| Personal Services | 50,628 | 50,628 |
| Operating Expense | 34,840 | 34,840 |
| Equipment | 133,000 | 0 |
| Total | 218,468 | 85,468 |
| **Funding:** | | |
| General Fund (01) | 218,468 | 85,468 |
| **Motor Vehicle Division:** | | |
| Operating Expenses | 550 | 550 |
| **Funding:** | | |
| General Fund (01) | 550 | 550 |
| **Net Impact on Fund Balance:** (Revenue minus expense) | | |
| General Fund (01) | (219,018) | (86,018) |

(Continued)

Dave Lewis 1-10-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Fred Van Valkenburg 1-13-97
FRED VAN VALKENBURG, PRIMARY SPONSOR DATE

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

A study at the Forensic Science Division shows that when someone is stopped by law enforcement for DUI, 40 percent of these people have other drugs on board. Current law only allows further drug tests if the alcohol level is below 0.10 gm/100 ml whole blood. This legislation would allow further drug testing at the officer's discretion.

**SEN. DOHERTY** reiterated that under the Feres Doctrine it is the individual members of the National Guard who cannot bring a suit against the federal government for damages while they are on active military duty.

**Lt. Col. McCabe** agreed that was correct.

Closing by Sponsor:

*{Tape: 1; Side: b; Approx. Time Count: 4.1; Comments: .}*

**SEN. VAN VALKENBURG** commented that there is a very important issue for the legislature to decide which is whether the State of Montana should continue to be subject to claims by individuals who have been injured as a result of activities conducted by the National Guard acting solely in its federal capacity. We all have great sympathy for injured individuals. Sometimes individuals bring about injuries through their own fault and are not compensated as a result of negligence. To the extent that there is fault or potential compensation, the federal government should be the entity that is responsible for making those individuals as whole as they can be made as a result of the injuries which they have suffered. To the extent that we assume federal liability for this, we are diverting Montana resources from the education of our children, the welfare of our citizenry, and the public safety of Montanans.

**CHAIRMAN CRIPPEN** explained the committee received a letter from Brian Abel of Helena who opposed the bill and asked that it be submitted as testimony. **EXHIBIT 3.**

## HEARING ON SB 106

*{Tape: 1; Side: b; Approx. Time Count: 10.2; Comments: .}*

Sponsor: **SENATOR VAN VALKENBURG**

Proponents:
- **--Brenda Nordlund, Assistant Attorney General for Department of Justice**
- **--Mike Menahan, Lewis and Clark Deputy County Attorney**
- **--Ben Havdahl, Montana Motor Carriers Association**
- **--Charles Brooks, Statewide DUI Task Force**
- **--Bert J. Obert, Officer, Montana Highway Patrol**
- **--Troy McGee, Helena Chief of Police representing Chiefs of Police Association in Montana**
- **--Jim Smith, Montana Sheriffs and Peace Officers**
- **--Association**

Opponents: **None**

Opening Statement by Sponsor:

**SEN. VAN VALKENBURG, Senate District 32, Missoula,** introduced SB 106. This bill was introduced at the request of the Department of

Justice. This bill is a general revision of driving under the influence laws with certain specific purposes. The Department has looked at past changes made in DUI laws, assessed their effectiveness in terms of dealing with the overall issue of keeping drunk drivers off the roads of Montana, and took into account court decisions that have interpreted some of those laws and fine tuned these laws to effectuate what the Department believes is the overall intent of the legislature in the past adoption of those laws. The most significant part of this bill is that the results of preliminary alcohol concentration tests would become clearly admissible evidence in DUI prosecutions. There are some jurisdictions which believe that those results are not admissible. Other jurisdictions conclude that they are admissible. This bill would clearly make them admissible.

**Proponents' Testimony**:

***{Tape: 1; Side: b; Approx. Time Count: 12.8; Comments: .}***

**Brenda Nordlund, Assistant Attorney General for Department of Justice,** stated she is also the liaison to the state DUI Task Force and was intimately involved with all the legislation which was passed last session. This bill is a technical bill where the Department seeks to fine tune existing laws to make the job of the law enforcement officer on the street and the prosecutor in the courtroom more efficient and clearly understandable by all. The preeminent amendment in this bill is that it will clearly allow the admissibility of preliminary alcohol screening tests in DUI trials and also a minor under the age of 21 operating a motor vehicle with an alcohol concentration in excess of .02. trials. The law which was amended in 1995, page 6, lines 26 thru 27, stated that the PBT test results may be used for determining whether probable costs exists to believe that a person violated either the DUI statute, the per se statute (in excess of .10) or the minor .02 statute. When the Department found itself in litigation over the PBT they found that district courts and justice courts were relying on this language, which is permissive in nature, to determine that PBT test results could not be used in the case in chief. They were using them solely for purposes of motions to suppress for lack of probable cause to support the arrest. That creates an anomaly because the officer is using scientific instrumentation to estimate the alcohol concentration in a motorist's body while at the same time he is using a battery of field sobriety tests which have been commonly employed and admitted into evidence in the course of the case in chief. Those tests are the walk and turn, the one-leg stand and the horizontal gaze and eye stagments. The anomaly is while they could use certain probable cause evidence, based on interpretations of last session's changes with the PBT statute, the PBT test results, which are arguably much more objective and less subjective than the other three tests which are commonly employed, were not getting to the jury. They would like this committee to clarify the proper interpretation of the use of PBT tests.

They are asking the committee to endorse the standardization and oversight of field sobriety testing and drug recognition expertise through the Department's use of training or recognition of training programs outside the Department by the Department.

Thirdly, they are changing the type of sampling which will be used in DUI prosecutions and .02 prosecutions or similar alcohol related prosecutions. They ask the committee to delete urine as a potential method of determining alcohol or drug concentration. They are also asking this committee to delete, as well, the provision contained in 61-8-402 which appears on page 3, lines 8 thru 10 under current law which restricts an officer from seeking a drug test if an alcohol concentration test comes back in excess of .10. The reason they are seeking this amendment is that the lab has done analyses of alcohol blood samples which have been sent to the lab for purposes of alcohol analysis and also run a parallel analysis for purposes of drug presence to determine what the prevalence is. They are finding significant prevalence of drug presence in those who have an alcohol concentration of .10 or greater but the Department cannot use that evidence either in the prosecution or in the treatment modality which this person may be subject to under the law because the law specifically says drug testing cannot be asked if we have an alcohol concentration in excess of .10.

Additionally, they are clarifying that blood or breath sampling should be done within a reasonable time after the act alleged. They are making two substantive changes to the current implied consent statute. Those changes are reflected in the amendments which have been passed out to the committee, **EXHIBIT 4.** This would be amendment 3. In additional to allowing implied consent testing for individuals who are arrested for DUI, it will also permit implied consent testing for individuals who are arrested for .02 violation under the age of 21 and it will allow officers to request implied consent testing where they have probable cause to arrest for the DUI but they have not in fact arrested largely because the driver has been involved in a motor vehicle accident, requires medical treatment or care. It is difficult to invoke the arrest and then unarrest the individual to make sure that the county or city who is arresting is no longer responsible for the medical treatment of that motorist. Most states do not require arrest before a implied consent statute is invoked. They are also clarifying the right to an independent test. Often times police officers are charged with impeding an individual's right to an independent test because they have not assisted the individual in transporting the individual to the hospital for this purpose. It is the position of the Department that it is not the role of the police officer to assist an individual in obtaining an independent test. This is reflected in amendment 9 on page 2 of the amendments suggested by the Department. Additional handout - **(EXHIBIT 5).**

**Mike Menahan, Lewis and Clark Deputy County Attorney,** spoke in favor of SB 106. He prosecutes a number of DUIs in this county. The main provisions of the bill which would be helpful to the

prosecution would be eliminating the provision requiring that a test for alcohol be given first before the crime lab can do a drug screen. This is important when a person's blood alcohol may be .10 or slightly above and there may not be a lot of evidence of unsafe driving. The crime lab is prohibited to run a drug screen on a person whose breath test comes back greater than .10. There may be cases where a person could have toxic levels of barbiturates in their system but the crime lab is not able to run a screen on that and he is not able to introduce that as evidence at trial in order to show that a person is impaired. That information would help both juries and judges in DUI cases. The second matter which would be helpful would be admissibility of the preliminary breath test. Often times when a police officer pulls someone over and they suspect them for DUI, they have a preliminary breath testing device in their vehicle and they ask the person if they will take the PBT test. When dealing with someone who is impaired, they will often take one test but then later refuse another. Or they will refuse a test at one point and agree to take tests later. Often he will get a report from an officer which states the person was arrested, they took a PBT and the results show that they were .2 or .15. When the person is taken to the jail where they have the intoxilizer, that person is given a second opportunity to take a breath test. At that point they refuse. They are arrested, confined, and in jail. At trial, he cannot use the results of the preliminary breath test taken at the scene which showed their blood alcohol to be twice the legal limit. Allowing the admissibility of the results of the PBT tests would help in the prosecution of DUI cases. The last provision was eliminating the provision that a person has to be under arrest before you can ask them to submit to a breath test. When a highway patrolman arrests a person and brings them up to the jail, they have to read them a form which states that they are under arrest for DUI. It is a formality which they all go through. The other day he had a highway patrolman who picked up a woman for her seventh DUI. She pled guilty to a felony DUI and was out on bond pending sentencing. He picked her up after she was in an accident. This was another felony DUI. He brought her to the jail and asked her if she would take a breath test. She did and then he realized that he hadn't read her the implied consent form which stated that she was under arrest. After reading her the form, she said she would not take the test.

**Ben Havdahl, Montana Motor Carriers Association,** stated the trucking industry has to comply with drug and alcohol testing. This bill brings the standards of .04 into compliance of consistency with those standards of the federal level. They support the changes in this bill.

**Charles Brooks, Statewide DUI Task Force,** commented they are a volunteer group of various citizens as well as professional law enforcement people throughout the state. They urge the committee to give this bill a do pass.

**Bert J. Obert, Officer with the Montana Highway Patrol,** voiced his support of this bill because this adds to the ability and the

potential to get as much evidence and provide as much information as possible to the court and jury to help them decide whether or not the person actually was or was not under the influence of alcohol. It is not intended to detract from any of the other tests whether they be physical or chemical that are done at this time. On page 3, line 17, he asked that law enforcement only be required to certify under penalty of law that the person did refuse the test and given the conditions, whether they were under arrest for driving under the influence, driving with a .02 and under 21 or that the person believes that they were involved in an accident. At present time they are required to notarize those statements. They request that they only be required to certify because it is extremely difficult at 2:00 or 3:00 a.m. to find a notary to take care of that information.

**Troy McGee, Helena Chief of Police representing Chiefs of Police Association in Montana,** stated they are in strong support of this bill.

**Jim Smith, Montana Sheriffs and Peace Officers Association,** commented they have been involved with the attorney general's law enforcement advisory group over the interim and worked on the development of this bill and it has the support of their association.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

*{Tape: 1; Side: b; Approx. Time Count: 30.2; Comments: .}*

**SEN. GROSFIELD** stated it was his understanding that blood testing reveals certain drugs while urine testing reveals other drugs. It was also his understanding that urine testing shows marijuana and other drugs which do not show up in blood testing.

**Ms. Nordland** commented that part of the rationale for eliminating urine testing is it is not currently being used by any law enforcement agency in the state for implied consent purposes. The other factor in eliminating urine testing is urine, as opposed to breath or blood testing, may indicate only the metabolite of a drug but not the fact that a psychoactive drug is actually present in the body at that time.

**Phil Lively, Division of Forensic Science,** explained that it is not the fact that they cannot find drugs in blood as opposed to the urine. Urine is much easier to work with. The metabolites are in higher concentrations. If they find the drug in the blood, there is no question as to the fact that at that point in time that drug was having a psychoactive effect on that individual. Finding the metabolite or artifactuals within the urine, they cannot go back and say that individual was being affected by that drug. The Division feels that if they are dealing with the DUI bill to where they need to assess an individual being under the influence of the

drug, they want to make sure the person was being affected by that drug and not merely representing some artifactual evidence.

**SEN. GROSFIELD** questioned whether marijuana showed up in the blood?

**Phil Lively** confirmed that it in fact does.

**SEN. DOHERTY** stated that in 1995 the Legislature, as a matter of public policy, stated that those tests were okay to establish probable cause but were not admissible into evidence in order to determine the amount of alcohol in the blood. Judge McKittrick is a very seasoned judge and during litigation has determined that that evidence is not admissible only because of the legislature's intent but that the PBT is incompetent evidence as to the amount of alcohol on board at that time. Why has Judge McKittrick gone off the deep end here?

**Ms. Nordland** explained that they are not alleging that Judge McKittrick, or any other judge who has reached a contrary ruling to the position urged here, has gone off the deep end. The case in reference is currently on appeal, the state has appealed it to the Montana Supreme Court. They recognize that part of that analysis did in fact depend on the text of section 61-8-410. In order for them to overcome future challenges to the use of the PBT in the case in chief, that text must be changed if it is read as a limitation upon the use of the PBT evidence. In terms of the reliability and the accuracy, they believe that Judge McKittrick erred. The Forensic Science Division has no qualifications about the preliminary breath testing instruments providing an accurate and reliable estimate of alcohol concentration in a person's body in terms of a roadside detection.

**SEN. DOHERTY** commented the public policy issue is that we want to make law enforcement's work a little easier and we want to get drunks off the road, however, in determining the scientific reliability there is conflicting testimony that deals with an individual being around .09 or .11 where that reliability of PBT makes it in Judge McKittrick's interpretation incompetent evidence.

**Ms. Nordland** stated that courts have ruled contrary to the position being espoused by the Department today. What this body needs to consider is that PBT test results will not be used in isolation in the case in chief. The decision to arrest and go forward on the DUI is based on a constellation of factors which may include the officer's observation of impaired driving, the discourse between the officer and the individual at the time of the stop, the individual's appearance, the odor of alcoholic beverage, the individual's speech and also an assessment of psychomotor skills. The Department is asking the committee to give the PBT results, the estimate of alcohol concentration, as least as much value in terms of competent evidence in assessing whether an individual was under the influence of alcohol as we are currently comporting officer

observations, HGNs and field sobriety tests which are routinely admitted in DUI prosecutions.

**SEN. SUE BARTLETT** asked for information relating to the reliability of the instruments which are used to administer the preliminary testing?

**Mr. Lively** started by describing the procedure by which all instrumentation must go through before they are even distributed to law enforcement. The Division of Forensic Science first gets approval from the National Highway Traffic Safety Administration, Department of Transportation for all instrumentation used. Those items are then placed upon the conforming products list of the United States. At that time, those instruments then are made available for review by the other states. In their program, when they use an instrument approved by the Department of Transportation, they take the same instrumentation and put them through subsequent accuracy, precision, and reliability testing. This is not only for the major units but also for the hand held PBTs. They must demonstrate their accuracy within a specified range. They must demonstrate that they have repeatability. There are 30 different hand helds on the market today. They have approved five.

**SEN. BARTLETT** asked what kind of maintenance is enforced to make sure that the ones actually in use are staying up to standard.

**Mr. Lively** answered that they have instrumented a continuing accuracy verification program on the instruments. The instruments must have a known alcohol standard run on them at least once every 31 days using either an alcohol liquid or gas. Trained personnel conduct the tests and keep an ongoing record of the accuracy verifications of the instrument. Because the PBTs are newly introduced into the state, they do not know what the maintenance course will be. They have an annual maintenance on their other instruments and he assumed they would have the PBTs meet the same qualifications.

**SEN. SHARON ESTRADA** asked what the situation would be for someone who was driving eradicably due to the influence of drugs and is taken into custody to be tested for DUI but no alcohol is found in his system?

**Chief of Police McGee** explained that they could be tested for drugs if they test below .10 on their alcohol test.

**SEN. GROSFIELD** asked if each instrument was tested or just the brand?

**Mr. Lively** answered that they do not have the capacity to test each instrument. Prior to the instrument being purchased, the manufacturers will supply the Division of Forensic Science with representative instrumentation. Those are the instruments which they test.

**SEN. GROSFIELD** asked if there is variation in how accurate they are by brand.

**Mr. Lively** stated the instrumentation must fall within a five percent accuracy for acceptance.

**SEN. GROSFIELD** stated that there is a certain range where they are not entirely accurate.

**Mr. Lively** commented there is nothing which is zero percent accurate. A five percent accuracy is in excess of medical standards for diagnostic instrumentation. As far as a test of .10, could that be a .105? Yes. Could that be a .095? Yes. Is that a significant alcohol concentration? Absolutely, it is. They do not look at just the fact that they got a number. It is the totality of all tools available.

**Closing by Sponsor**:

***{Tape: 2; Side: a; Approx. Time Count: 8.8; Comments: .}***

**SEN. VAN VALKENBURG** stated the fiscal note was prepared with some worse case scenario assumptions. The bill has a negative impact on the General Fund of $219,000 in the first year of the biennium and $86,000 in the second year. This assumes that the Forensic Science Division is operating at full capacity and needs additional equipment and personnel to perform these tests. The Department is probably willing to take this bill without funding for the coming biennium because of its desire to deal with the significant issues in the bill. The total fiscal impact deals with the language in the bill which is being stricken on page 3, lines 9 and 10. While it is true that the State of Montana has a prohibition about driving motor vehicles with a blood alcohol concentration in excess of .10 what they are primarily talking about is driving under the influence of alcohol prosecutions, not per se prosecutions. In that regard, the issue of .10 is only an evidentiary issue which gives rise to an inference that a person is under the influence of alcohol. It is still possible to prosecute someone who has a blood alcohol concentration less than .10 and it also means that if they are in excess of .10 they are not necessarily guilty of driving under the influence of alcohol. This bill becomes necessary because they have found out through court decision and application of the laws that our statutes can be improved and fine tuned.

## EXECUTIVE ACTION ON SB 36

*{Tape: 2; Side: b; Approx. Time Count: 12.9; Comments: .}*

**Amendments**: sb003601.agp **(EXHIBIT 6)** - Amendments 1 and 2

**Discussion:**

**CHAIRMAN CRIPPEN** stated there was an amendment which dealt with section 178, page 174, line 18.

MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL

DATE 1/14/97

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| SUE BARTLETT | ✓ | | |
| AL BISHOP | ✓ | | |
| STEVE DOHERTY | ✓ | | |
| SHARON ESTRADA | ✓ | | |
| MIKE HALLIGAN | ✓ | | |
| RIC HOLDEN | ✓ | | |
| REINY JABS | ✓ | | |
| WALT MC NUTT | ✓ | | |
| LORENTS GROSFIELD, VICE CHAIRMAN | ✓ | | |
| BRUCE CRIPPEN, CHAIRMAN | ✓ | | |
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DATE 1/14/97

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB103, SB106

< ■ > PLEASE PRINT < ■ >

| Name | Representing | Bill No. | Check One: Support | Check One: Oppose |
|---|---|---|---|---|
| Bert J. Obert | Justice, MHP | 106 | ✓ | |
| MG John E. Prendergast | TAG MT NG | 103 | ✓ | |
| Lt Mick Mack | SJTI - MING | 103 | ✓ | |
| Charles R. Brooks | DUI Task Force | 106 | ✓ | |
| Ben Havdahl | MT Motor Carriers Assn | 106 | ✓ | |
| Hagan, Roger A. | Enlisted / Officer Assoc. National Guard of MT | 103 | ✓ | |
| Brenda Nordlund | Dept of Justice | 106 | ✓ | |
| Phil Lively | Forensic Science | 106 | ✓ | |
| Jamie Tasa | — | | | X |
| Bill Grimes | RMTI, Administration | 103 | ✓ | |
| Mike Menahan | Lewis & Clark Co. Atty Office | 106 | ✓ | |
| Tracy McGee | MT. Assoc. Chiefs Police | 106 | ✓ | |
| Jim Smith | Sheriff's Assoc | 106 | X | |
| Russell B. Hill | MT Trial Lawyers | 103 | | ✓ |

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10

**SENATOR HALLIGAN.** That is a good point, as there is a lot of turnover in attorneys trying to help out with the Justices of the Peace.

**Motion/Vote: SENATOR ESTRADA MADE A MOTION THAT SB 158 DO PASS AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.**

## EXECUTIVE ACTION ON SB 143

**Motion: SENATOR HOLDEN MADE A MOTION THAT SB 143 DO NOT PASS.**

**Discussion: SENATOR HALLIGAN.** Is there any interest in tabling this bill and giving **SENATOR TOEWS** an opportunity to correct the problems in the bill? This is a problem in Montana.

**SENATOR ESTRADA.** Some ranchers are unhappy about the bill.

**SENATOR HOLDEN.** I do believe we need some legislation of this type, but we need more time to iron out the problems in the bill.

**CHAIRMAN CRIPPEN.** I can sympathize with the situation. There is remedy of law now, if the land is used for agricultural purposes. So, if its being used for a home or other use, there's still a problem. I don't mind tabling the bill, but I see problems the way it's drafted now. Banks will loan on these lands based on other assets of the applicant, so I'm not all that sympathetic with the bill.

**SENATOR JABS.** What about prescriptive easements?

**Substitute Motion/Vote: SENATOR JABS MADE A SUBSTITUTE MOTION TO TABLE SB 143. THE MOTION CARRIED UNANIMOUSLY.**

## EXECUTIVE ACTION ON SB 31

**Discussion: SENATOR HALLIGAN.** What if we don't pass this bill, and the House passes their bill with "voluntary" language?
**CHAIRMAN CRIPPEN.** I am aiming at having the Committee read the Department of Corrections amendments, and taking Executive Action on Wednesday, January 22, 1997.

## EXECUTIVE ACTION ON SB 106

**Amendments:** Department of Justice, sb0106.avl **(EXHIBIT #5)**

**Brenda Nordlund, Department of Justice,** drafter of the amendments. Amendment #2 is necessary, as we need to strike the subparagraph reference. It is much easier that way. Amendments #3, 4, and 5 are technical and are all related. They change language in terms of conditions as to when testing can be required. Amendments #6 and 7 are needed to modify officer. Amendment #9 describes information to be provided to the Department of Justice prior to suspension of a license. Amendment #11 parallels the amendment to 61-8-403, MCA, and

reflects three conditions proposed in the prior amendment, as well as limits of presentation in court on page 3, sub (iv).

**Discussion:** **VICE CHAIRMAN GROSFIELD.** I would like to see one or two tests, and not three or four or sixteen tests. I would propose to strike lange for testing "if breath test is .10 or greater, and could be also followed by blood test for drugs". **Brenda Nordlund.** The breath test would be the first test, and the blood test would be the second test.

**VICE CHAIRMAN GROSFIELD.** The language says one or more. I am concerned about an officer being frustrated with someone and administering more tests than necessary.

**Brenda Nordlund.** Amendment #14 states that the right to obtain an independent test, should not be unreasonably impeded by law enforcement officers, but it is not the officer's duty to obtain exculpatory evidence. The individual could get the assistance of someone else, generally via written release, to stop any civil liability any officer may have.

It could be argued that the officer acted unreasonably if they had no other means to get to a hospital, etc., but it is not the responsibility of the State to provide this type of assistance.

**CHAIRMAN CRIPPEN.** We are talking about refusing to take a blood test. **Brenda Nordlund.** Then the officer may very well want to transport the individual to preserve evidence through a facility for independent testing.

**CHAIRMAN CRIPPEN.** So the door could be left open for the officer to transport an individual who has no other means of obtaining independent testing. Brenda Nordlund. I would want to clarify that the officer had "no duty".

**Motion:** **SENATOR HALLIGAN MADE A MOTION TO ADOPT THE AMENDMENTS PROPOSED BY THE DEPARTMENT OF JUSTICE.**

**Discussion:** **SENATOR HOLDEN.** On page 1, part 2, line 19, is current law being changed here? **Brenda Nordlund.** This is merely an internal reference problem. In 61-5-212, MCA there is a reference to 61-8-402.5, MCA. Subsection 5 is no longer accurate.

**SENATOR HOLDEN.** Has there been any hardship to families with one vehicle since this legislation was enacted? **Brenda Nordlund.** Not to my knowledge.

**Substitute Motion:** **VICE CHAIRMAN GROSFIELD MADE A SUBSTITUTE MOTION** to segregate amendment #14, and on line 3, following "officer" and insert "may".

**SENATOR HALLIGAN WITHDREW HIS MOTION TO ADOPT THE DEPARTMENT'S AMENDMENTS IN THEIR ENTIRETY.**

**Motion/Vote: SENATOR GROSFIELD CHANGED HIS MOTION TO ADOPT AMENDMENT #14 WITH THE CHANGES HE PROPOSED. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR JABS, WHO VOTED NO.**

**Motion/Vote: SENATOR HALLIGAN MADE A MOTION TO ADOPT AMENDMENTS #1-13 AND #15, ALONG WITH THE APPROVED CHANGES TO AMENDMENT #14. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE, EXCEPT SENATOR ESTRADA WHO VOTED NO.**

Discussion: **SENATOR DOHERTY.** I had a problem with PBT being supported in 1995, as Mr. Lively said portable or preliminary brass tester (PBT) was to be used for probable cause only, and this was part of the findings of Judge McKittrick. It was built for probable cause function. How many are and are not using it as such? Both five percent and ten percent was used in testimony with regard to variance.

This matter is currently on appeal with the Montana Supreme Court. We just did this in 1995, and adopted administrative rules. So, I want to know why the Department of Justice wants this change now. **Brenda Nordlund.** I believe the 1995 language in 61-8-409(2), MCA, was ambiguous. "May" is permissive, but the Court read it as restricting. The reference was in the regulation prior to adoption of PBTs and was also to apply to horizontal gaze nystagmus (HGN). When the Great Falls cases began to percolate up, then we saw the problem with non-evidential. The Court doesn't segregate evidence in terms of probable cause, re: the case of **Chief**. In 61-8-409, MCA, (**City v. Strizich**), the Department needs to pick its fights carefully, and is, thus, seeking clarification from the Legislature with regard to DUI trials.

**SENATOR DOHERTY.** It came out in Chief that other states don't use PBT. This is a policy decision for the community. There are wide variations in reliability of tests. This is one tool, and in our society, if it's a machine, we tend to believe it. This would make my job easier, if I wanted to prosecute DUIs, but in terms of allowing the State to amass evidence against an individual, in terms of what the Department of Justice wants, I don't know if this is proper.

**(EXHIBITS #6, #7, #8, #9)**

**Motion/Vote: SENATOR HALLIGAN MADE A MOTION THAT SB 106 DO PASS AS AMENDED. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS ESTRADA and DOHERTY, WHO VOTED NO.**

Motion/Vote: **SENATOR GROSFIELD CHANGED HIS MOTION TO ADOPT AMENDMENT #14 WITH THE CHANGES HE PROPOSED. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR JABS, WHO VOTED NO.**

Motion/Vote: **SENATOR HALLIGAN MADE A MOTION TO ADOPT AMENDMENTS #1-13 AND #15, ALONG WITH THE APPROVED CHANGES TO AMENDMENT #14. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE, EXCEPT SENATOR ESTRADA WHO VOTED NO.**

Discussion: **SENATOR DOHERTY.** I had a problem with PBT being supported in 1995, as Mr. Lively said portable or preliminary brass tester (PBT) was to be used for probable cause only, and this was part of the findings of Judge McKittrick. It was built for probable cause function. How many are and are not using it as such? Both five percent and ten percent was used in testimony with regard to variance.

This matter is currently on appeal with the Montana Supreme Court. We just did this in 1995, and adopted administrative rules. So, I want to know why the Department of Justice wants this change now. **Brenda Nordlund.** I believe the 1995 language in 61-8-409(2), MCA, was ambiguous. "May" is permissive, but the Court read it as restricting. The reference was in the regulation prior to adoption of PBTs and was also to apply to horizontal gaze nystagmus (HGN). When the Great Falls cases began to percolate up, then we saw the problem with non-evidential. The Court doesn't segregate evidence in terms of probable cause, re: the case of **Chief**. In 61-8-409, MCA, (**City v. Strizich**), the Department needs to pick its fights carefully, and is, thus, seeking clarification from the Legislature with regard to DUI trials.

**SENATOR DOHERTY.** It came out in Chief that other states don't use PBT. This is a policy decision for the community. There are wide variations in reliability of tests. This is one tool, and in our society, if it's a machine, we tend to believe it. This would make my job easier, if I wanted to prosecute DUIs, but in terms of allowing the State to amass evidence against an individual, in terms of what the Department of Justice wants, I don't know if this is proper.

**(EXHIBITS #6, #7, #8, #9)**

Motion/Vote: **SENATOR HALLIGAN MADE A MOTION THAT SB 106 DO PASS AS AMENDED. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS ESTRADA and DOHERTY, WHO VOTED NO.**

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 1-20-97
BILL NO. SB106

Amendments to Senate Bill No. 106
First Reading Copy (white)

Requested by Senator Van Valkenburg (DOJ)
For the Committee on Judiciary

Prepared by Brenda Nordlund (put into form by Valencia Lane)
January 15, 1997

1. Title, line 15.
Following: "SECTIONS"
Insert: "61-5-212,"
Following: "61-8-402,"
Insert: "61-8-403,"

2. Page 1, following line 19.
Insert: "**Section 1.** Section 61-5-212, MCA, is amended to read:

"**61-5-212. Driving while license suspended or revoked -- penalty -- seizure of vehicle or rendering vehicle inoperable.** (1) A person who drives a motor vehicle or commercial motor vehicle on any public highway of this state at a time when the person's privilege to do so is suspended or revoked in this state or any other state is guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than 2 days or more than 6 months and may be fined not more than $500.

(2) The department upon receiving a record of the conviction of any person under this section upon a charge of driving a vehicle while the person's driver's license was suspended or revoked shall extend the period of suspension or revocation for an additional like period.

(3) The vehicle owned and operated at the time of an offense under this section by a person whose driver's license is suspended or revoked for violating the provisions of 61-8-401, 61-8-402~~(5)~~, 61-8-406, 61-8-409, or 61-8-410 must, upon a person's first conviction, be seized or rendered inoperable by the county sheriff of the convicted person's county of residence for a period of 30 days.

(4) The sentencing court shall order the action provided for under subsection (3) and shall specify the date on which the vehicle is to be returned or again rendered operable. The vehicle must be seized or rendered inoperable by the sheriff within 10 days after the conviction.

(5) A convicted person is responsible for all costs associated with actions taken under subsection (3). Joint ownership of the vehicle with another person does not prohibit the actions required by subsection (3) unless the sentencing court determines that those actions would constitute an extreme hardship on a joint owner who is determined to be without fault.

(6) A court may not suspend or defer imposition of penalties provided by this section."
{*Internal References to 61-5-212:*
*ok 61-8-421* *ok61-8-421* *ok61-8-422*}
"

Renumber: subsequent sections

3. Page 3, lines 3 and 4.
Following: "body" on line 3
Strike: remainder of line 3 through "drugs." on line 4
Insert: ". (2)(a)"
Renumber: subsequent subsections

4. Page 3, line 5.
Strike: "who"
Insert: "when:
(i) the officer"

5. Page 3, line 7.
Following: "two"
Insert: "and the person has been placed under arrest for a violation of 61-8-401;
(ii) the person is under the age of 21 and has been placed under arrest for a violation of 61-8-410; or
(iii) the officer has probable cause to believe that the person was driving or in actual physical control of a vehicle in violation of 61-8-401 and the person has been involved in a motor vehicle accident or collision resulting in property damage, bodily injury, or death"

6. Page 3, line 7.
Following: "."
Insert: "(b)"
Following: "arresting"
Insert: "or investigating"

7. Page 3, line 14.
Strike: "arresting"

8. Page 3, line 15.
Strike: "(1)"
Insert: "(2)"

9. Page 3, lines 17 through 20.
Following: "law" on line 17
Strike: remainder of line 17 through "noting" on line 20
Insert: "stating which of the conditions set forth in subsection (2)(a) provides the basis for the testing request and confirming"

10. Page 3, line 22.
Strike: "(5)"
Insert: "(6)"

11. Page 4, line 16.
Insert: "**Section 4.** Section 61-8-403, MCA, is amended to read:
"**61-8-403. Right of appeal to court.** (1) Within 30 days after notice of the right to a hearing has been given by a peace officer, a person may file a petition to challenge the license suspension or revocation in the district court in the county where the person resides or in the county where the arrest was made.

(2) The court has jurisdiction and shall set the matter for hearing. The court shall give at least 10 days' written notice of the hearing to the county attorney of the county where the appeal is filed and to the city attorney if the incident leading to the suspension or revocation resulted in a charge filed in a city or municipal court. The county attorney or city attorney may represent the state. If the county attorney and the city attorney cannot agree on who will represent the state, the county attorney shall represent the state.

(3) Upon request of the petitioner, the court may order the department to return the seized license or issue a stay of the suspension or revocation action pending the hearing.

(4) (a) The court shall take testimony and examine the facts of the case, except that the issues are limited to whether:

(i) a peace officer had reasonable grounds to believe that the person had been driving or was in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person was placed under arrest for violation of 61-8-401;

(ii) the person ~~was placed under arrest; and~~ is under the age of 21 and was placed under arrest for a violation of 61-8-410;

(iii) the officer had probable cause to believe that the person was driving or in actual physical control of a vehicle in violation of 61-8-401 and the person was involved in a motor vehicle accident or collision resulting in property damage, bodily injury, or death; and

~~(iii)~~(iv) the person refused to submit to ~~the test or~~ one or more tests designated by the officer.

(b) ~~The~~ Based on the above issues and no others, the court shall determine whether the petitioner is entitled to a license or whether the petitioner's license is subject to suspension or revocation.

(5) This section does not grant a right of appeal to a state court if a driver's license is initially seized, suspended, or revoked pursuant to a tribal law or regulation that requires alcohol or drug testing of motor vehicle operators.""
Renumber: subsequent sections

12. Page 5, line 8.
Following: first "was"
Strike: "for alcohol and was"

13. Page 5, line 9.
Following: "or"
Strike: "if it was for drugs and was made by a person certified"
Insert: "by a person who has received training recognized"

14. Page 5, line 30.
Following: "~~urine~~."
Insert: "The peace officer may not unreasonably impede the person's right to obtain an independent blood test; however, the officer has no duty to transport the person to a medical facility or otherwise assist the person in obtaining the test."

15. Page 7, line 9.
Strike: "(2) through (7)"
Insert: "(3) through (8)"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. #6
DATE 1-20-97
BILL NO. SB 106

# MONTANA DEPARTMENT OF JUSTICE

## SUPPLEMENTAL INFORMATION REQUESTED BY AND PREPARED FOR THE SENATE JUDICIARY COMMITTEE CONCERNING SB 106

**BACKGROUND:**

The preliminary breath tester, commonly referred to as "PBT," was first introduced to American law enforcement in the early 1960s. Since that time over 100,000 units (according to the manufacturers) have been placed into service in the law enforcement and industrial market, as well as under the Federal Omnibus Transportation Act. Under the Federal Omnibus Information Act nearly 11 million citizens will be tested for alcohol use on the job this year alone. Over 75% of these tests will be done with a PBT that is listed in the Federal Register on the Conforming Products List, a copy of which is attached as Exhibit "A."

Phil Lively, who appeared before the Senate Judiciary Committee on January 14, 1997, to provide technical information concerning SB 106, and PBTs in particular, has been involved with the PBT since 1976 and has had the opportunity to witness the continued evolution of these instruments. Except where otherwise indicated, the information provided here was prepared by Mr. Lively.

The United States Department of Transportation has a division located in Cambridge, Massachusetts which is assigned the responsibility of testing, evaluation and approving breath alcohol analysis instrumentation for inclusion to the Federal Register Conforming Products List. Inclusion on this list is the first major step in the approval process of those states which further examine and approve instruments prior to placement or use across this country. According to information compiled by the U.S. Department of Transportation, as of January 1, 1997, 31 states have legislation authorizing the use of PBTs.

Under Mont. Code Ann. § 61-8-405(6), the Department was given the authority to ". . . adopt uniform rules for the giving of tests." This responsibility was placed on the Forensic Science Division and in 1971, administrative rules were first adopted under the authority of this statute. A copy of the current version of the administrative rules, Mont. Admin. R. 23.4.201 et seq., is attached here, marked as Exhibit "B."

The regulations establish a foundational requirement that the Forensic Science Division of the Department of Justice must approve, following established evaluation criteria, all "breath analysis instruments" and all "associated equipment" prior to an instrument being introduced and used for the analysis of breath in Montana. Mont. Admin. R. 23.4.212.

Under this rule, all instruments currently used in the analysis of breath for alcohol have been tested, evaluated and approved by the Forensic Science Division and have met or exceeded the parameters set forth. Further, they have also been approved by the U.S. Department of Transportation, National Highway Traffic Safety Administration, as well as numerous other states and several foreign countries.

**APPROVAL PROCEDURE:**

The Forensic Science Division approval protocol for testing instruments for use in breath analysis focuses on the following areas: ACCURACY, PRECISION, REPEATABILITY AND RELIABILITY.

**ACCURACY:** (measurement relative to a standard)

The instrument is tested using known alcohol standards. Each analysis or a standard must be within 5% of the target value of that particular standard (i.e., a .100% standard must yield a reading of no greater than .105% and no less than .095%).

A second testing procedure is a "blank breath test." Each unit is given a sample of non-alcohol breath and must provide a reading of .000%.

The instrument then is evaluated on a comparative analysis basis by testing drinking subjects using both the PBT and the Intoxilyzer.

**PRECISION:** (Repeatability from multiple measurements).

The instrument is tested using known alcohol standards. Each standard is run five consecutive times. The instrument must maintain a repeatability factor within 5% for each of the five tests (i.e., multiple target values of .05, .100, .200, .300). The first and all subsequent analysis must be within 5% of each of those values for each of the five tests.

For example, if a .100% target simulator provided a .097% result the subsequent samples must read no greater than .101% and no less than .093%. A reading of .103% although well within the acceptable range for accuracy, would fail under the precision function.

**RELIABILITY:**

The reliability determinant is a function of contact with other users of the instrument, training in the electronics and mechanics of the instruments, and continual monitoring of the instrument's performance through laboratory testing and reports from the senior operators responsible for the accuracy verification of each instrument used in the field.

The current PBTs approved by the Forensic Science Division have met the criteria described in each of the above sections.

In addition, enclosed are excerpts of findings from papers prepared by the U.S. Department of Transportation, National Highway Safety Administration, Office of Driver and Pedestrian Safety (Exhibit "C") and the Mesa Police Department, Toxicology section, Mesa, Arizona (Exhibit "D").

**FIELD v. LABORATORY:**

In an effort to monitor the relationship of the PBT to the actual breath analysis, we have requested the designated officer keep a record of the PBT result and the Intoxilyzer result and time. This data will be gathered and analyzed to examine the actual field comparative difference between the two. The data at this point in time is limited, however, it appears that the PBT results in the majority of the instances we have heard of or received data on correlate very well with the infrared breath analysis.

**MAINTENANCE/ACCURACY VERIFICATION:**

Each PBT must be verified for accuracy by a senior operator at least once every 31 days, in accordance with Mont. Admin. R. 23.4.213(2). This verification provides for the best possible tracking of the instrument performance and reliability that the division can effectively implement. The individuals performing the verification have received specific training in the procedure and have also received instruction on the care and minor maintenance of the instrument.

Two individuals in the Breath Analysis Section of the Forensic Science Division have received technical instruction on the maintenance and repair of the PBTs. We currently provide for all of the repair and maintenance for the breath analysis instruments and hope to be able to provide the same function for the PBT.

**PBT USUAGE IN MONTANA:**

According to information provided to the Department by the Montana Department of Transportation, Traffic Safety Bureau, 133 PBT units were purchased and placed into use in Montana, via TSB grants in FY 96. At least 50 additional units have been purchased directly by local DUI task forces. During FY 97, contracts will be written to purchase approximately 268 units for use throughout the state.

4236–38, 400 7th Street, SW., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Marlene Vermillion, Flight Standards Service, Air Transportation Division (AFS–200), 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–8166.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App II), notice is hereby given of a meeting of the Aviation Rulemaking Advisory Committee to be held on May 12, 1994, at the Nassif Building, Headquarters, Department of Transportation, room 4236–4238, 400 7th Street, SW., Washington, DC 20590. The agenda for this meeting will include a progress report from the Flight Crewmember Flight/Duty/Rest Requirements Working Group. Attendance is open to the interested public but may be limited to the space available. The public must make arrangements in advance to present oral statements at the meeting or may present written statements to the committee at any time. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT.**

Sign and oral interpretation can be made available at the meeting, as well as an assistive listening device, if requested 10 calendar days before the meeting.

Issued in Washington, DC, on April 14, 1994.

Quentin J. Smith,

*Assistant Executive Director for Air Carrier Operations, Aviation Rulemaking Advisory Committee.*

[FR Doc. 94–9565 Filed 4–19–94; 8:45 am]

BILLING CODE 4910–13–M

## Federal Highway Administration

### Environmental Impact Statement: Benton County, MO

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed project in Benton County, Missouri.

**FOR FURTHER INFORMATION CONTACT:** Mr. Donald Neuman, Federal Highway Administration, P.O. Box 1787, Jefferson City, MO 65102, Telephone Number 314–636–7104; or Mr. Robert Sfreddo, Design Engineer, Missouri Highway and Transportation Department, P.O. Box 270, Jefferson City, MO 65102, Telephone Number 314–751–2876.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Missouri Highway and Transportation Department (MHTD), will prepare an environmental impact statement (EIS) on a proposal to build a four lane relocation of U.S. Route 65 in Benton County, Missouri. The improved highway would have a positive economic and social impact on the Lake of the Ozarks region by providing traffic relief, increased mobility, and enhanced social and economic opportunities.

1. The proposed highway project begins in Benton County south of the Missouri Route 52 South Junction, and proceeds southward to the Missouri Route 7 North Junction at Warsaw. It also includes highway from Route 83 south to Route MM. The total project distance is approximately 17.5 miles. The proposal will provide partial relocation of U.S. Route 65 through the Lake of Ozarks region. The proposed project would provide a four-lane roadway with freeway right of way for the entire length of the project. Interchanges will be provided at or near major arterial crossroads.

2. Alternatives currently under consideration include "build" alternatives, the "no build" alternative, and upgrading of existing facilities.

3. To date, preliminary information has been furnished to local officials, legislators, and other interested parties. Presentation of the concept has been made at the local level and input received. The scoping process has been initiated with Federal, State and local agencies. Further public hearings also will be held. To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments and questions concerning this proposed action and the EIS should be directed to the FHWA or the Missouri Highway and Transportation Department at the addresses provided above.

Issued on: January 18, 1994.

Donald Neumann,

*Program Engineer, Jefferson City.*

[FR Doc. 94–9503 Filed 4–19–94; 8:45 am]

BILLING CODE 4910–22–M

## National Highway Traffic Safety Administration

[NHTSA Docket No. 94–021; Notice 1]

### Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice.

**SUMMARY:** This notice amends the Conforming Products List for instruments that conform to the Model Specifications for Evidential Breath Testing Devices (58 FR 48705).

**EFFECTIVE DATE:** April 20, 1994.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Robin Mayer, Office of Alcohol and State Programs, NTS–21, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590; Telephone: (202) 366–9825.

**SUPPLEMENTARY INFORMATION:** On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38 FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974, (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices, and a Conforming Products List (CPL) of instruments that were found to conform to the Model Specifications was published as Appendix D to that notice (49 FR 48864).

On September 17, 1993, NHTSA published a notice (58 FR 48705) to amend the Model Specifications. The notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC; added a test for the presence of acetone; and expanded the definition of alcohol to include other low molecular weight alcohols including methyl or isopropyl. The September 17, 1993, notice included, as Appendix A, a Conforming Products List (CPL) identifying those instruments found to conform with the Model Specifications.

Since the last publication of the CPL, six (6) instruments have been evaluated and found to meet the model specifications, as amended on September 17, 1993, for mobile and non-mobile use: CMI, Inc.'s, Intoxilyzer 5000CD/FG5 and SD2; Intoximeters, Inc.'s Intox EC–IR and Alcomonitor CC;

EXHIBIT A

Life-Loc Inc.'s PBA 3000B; and National Draeger, Inc.'s Breathalyzer 7410. The designation of the National Draeger "Breathalyzer 7410" represents a change in the model designation, from "Alcotest 7410".

The Conforming Products List is therefore amended, as set forth below, to reflect the results of these evaluations. It identifies those instruments found to conform with the model specifications as amended in 58 FR 48705 (September 17, 1993), and also those instruments found to conform with the Model Specifications detailed in 49 FR 48854 (December 14, 1984).

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

| Manufacturer and model | Mobile | Nonmobile |
|---|---|---|
| Alcohol Countermeasures System, Inc. Port Huron, MI | | |
| Alert J3AD* | X | X |
| BAC Systems, Inc., Ontario, Canada | | |
| Breath Analysis Computer*. | | X |
| CAMEC Ltd., North Shields, Tyne and Ware, England | | |
| IR Breath Analyzer*. | X | X |
| CMI, Inc., Owensboro, KY | | |
| Intoxilyzer Model 200. | X | X |
| 1400 | X | X |
| 4011* | X | X |
| 4011A* | X | X |
| 4011AS* | X | X |
| 4011AS–A* | X | X |
| 4011AS–AQ* | X | X |
| 4011 AW* | X | X |
| 4011A27–10100* | X | X |
| 4011A27–10100 with filter*. | X | X |
| 5000* | X | X |
| 5000 (w/Cal. Vapor Re-Circ.)*. | X | X |
| 5000 (w/⅜" ID Hose option)*. | — | |
| 5000CD | X | X |
| 5000CD/FG5 | X | X |
| 5000 (CAL DOJ)* | X | X |
| 5000VA | X | X |
| PAC 1200* | X | X |
| S–D2 | X | X |
| Decator Electronics, Decator, IL | | |
| Alco-Tector model 500*. | | X |
| Intoximeters, Inc., St. Louis, MO | | |
| Photo Electric Intoximeter*. | | X |
| GC Intoximeter MK II*. | X | X |

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

| Manufacturer and model | Mobile | Nonmobile |
|---|---|---|
| GC Intoximeter MK IV*. | X | X |
| Auto Intoximeter* | X | X |
| Intoximeter Model 3000*. | X | X |
| 3000 (rev B1)* | X | X |
| 3000 (rev B2)* | X | X |
| 3000 (rev B2A)* | X | X |
| 3000 (rev B2A) w/FM option*. | X | X |
| 3000 (Fuel Cell)* | X | X |
| 3000 D* | X | X |
| 3000 DFC* | X | X |
| Alcomonitor | | X |
| Alcomonitor CC | X | X |
| Alco-Sensor III | X | X |
| Alco-Sensor IV | X | X |
| RBT III | X | X |
| RBT III–A | X | X |
| RBT IV | X | X |
| Intox EC–IR | X | X |
| Komyo Kitagawa, Kogyo, K.K. | | |
| Alcolyzer DPA–2* | X | X |
| Breath Alcohol Meter PAM 101B*. | X | X |
| Life-Loc, Inc., Wheat Ridge, CO | | |
| PBA 3000B | X | X |
| PBA 3000–P* | X | X |
| Lion Laboratories, Ltd., Cardiff, Wales, UK | | |
| Alcolmeter Model. | | |
| AE–D1* | X | X |
| SD–2* | X | X |
| EBA* | X | X |
| Auto-Alcolmeter* | | X |
| Luckey Laboratories, San Bernadino, CA | | |
| Alco-Analyzer Model 1000*. | | X |
| 2000* | | X |
| National Draeger, Inc., Pittsburgh, PA | | |
| Alcotest Model 7010*. | X | X |
| 7110* | X | X |
| 7410 | X | X |
| Breathalyzer Model 900*. | X | X |
| 900A* | X | X |
| 900BG* | X | X |
| 7410 | X | X |
| National Patent Analytical Systems, Inc., Mansfield, OH | | |
| BAC DataMaster | X | X |
| BAC DataMaster—Transportable. | X | X |
| Omicron Systems, Palo Alto, CA | | |
| Intoxilyzer Model 4011*. | X | X |
| 4011AW* | X | X |

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

| Manufacturer and model | Mobile | Nonmobile |
|---|---|---|
| Plus 4 Engineering, Minturn, CO | | |
| 5000 Plus4* | X | X |
| Siemans-Allis, Cherry Hill, NJ | | |
| Alcomat* | X | X |
| Alcomat F* | X | X |
| Smith and Wesson Electronics, Springfield, MA | | |
| Breathalyzer Model 900*. | X | X |
| 900A* | X | X |
| 1000* | X | X |
| 2000* | X | X |
| 2000 (non-Humidity Sensor)*. | X | X |
| Stephenson Corp. | | |
| Breathalyzer 900* | X | X |
| U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, CA | | |
| Alco-Analyzer 1000. | | X |
| Alco-Analyzer 2000. | | X |
| Alco-Analyzer 2100. | X | X |
| Verax Systems, Inc., Fairport, NY | | |
| BAC Verifier* | X | X |
| BAC Verifier Datamaster*. | X | X |
| BAC Verifier Datamaster II*. | X | X |

*Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993). (23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501.8)

**Michael B. Brownlee,**

*Associate Administrator for Traffic Safety Programs.*

[FR Doc. 94–9510 Filed 4–19–94; 8:45 am]

BILLING CODE 4910–59–P

## Research and Special Programs Administration Office of Hazardous Materials Safety

## Applications for Modification of Exemptions or Applications To Become a Party to an Exemption

**AGENCY:** Research and Special Programs Administration, DOT.

**ACTION:** List of Applications for Modification of Exemptions or Applications to Become a Party to an Exemption.

Approved for use in Montana

Sub-Chapter 2

Drug and/or Alcohol Analysis

23.4.201 DEFINITIONS Unless the context requires otherwise, the following definitions apply to this subchapter:

(1) "Accessory" means any device or item which may or may not be expendable, but assists in the operation of the breath analysis instrument, i.e., a surge suppressor.

(2) "Alcohol" means an organic hydrocarbon molecule which contains a hydroxyl (oxygen, hydrogen) as its primary functional group, such compounds to include such common alcohols as: methanol, ethanol, isopropanol and all other compounds chemically classed as an alcohol.

(3) "Alcohol analyses" includes all manipulations required to achieve a result demonstrating the presence and or concentration of alcohol in breath, blood or any other bodily substance.

(4) "Alveolar air" means that air which is located in the alveoli region of the lungs and is responsible for the exchange of gases between the blood and the lung. This is the type of breath upon which the 2100:1 breath blood ratio is established.

(5) "Anticoagulant" means any substance which prevents the clotting of the blood sample.

(6) "Authorized designee" means a breath test specialist/operator selected by the breath test specialist/senior operator to perform the senior operator's duties in the event of the senior operator's absence.

(7) "Associated equipment" means

(a) any device which can be directly attached to the breath analysis instrument and is not considered an expendable item, i.e., a wet bath simulator; or

(b) any approved device which is designed to detect and verify the presence of alcohol or provide an estimated value of alcohol concentration. Analyses from this type of device, e.g. a preliminary breath tester, are to be considered as probable cause evidence only.

(8) "Blood" refers to whole blood which contains the cellular components and the serum of plasma of blood.

(9) "Breath" refers to that portion of exhaled deep lung air that is collected for alcohol analysis.

(10) "Breath analysis instrument" means any device which is capable of capturing and analyzing deep lung air to establish the concentration of alcohol contained in that sample. Such instruments must be approved by the division of forensic science.



EXHIBIT B

(11) "College of American pathologists" means the organization nationally recognized by that name with headquarters in Traverse City, Michigan, which surveys clinical laboratories upon their request and accredits clinical laboratories which it determines meet its standards and requirements.

(12) "Deep lung air" means that air which comes from the deeper section of the lung and contains only a portion of alveolar air. This is the type of breath captured by the breath analysis instrument.

(13) "Department" means the department of justice.

(14) "Division" means the forensic science division of the department of justice.

(15) "Breath analysis instrument change" means any substitution or replacement of any electronic, optical, or mechanical part or device which adheres to the original specification(s) and does not effect or change the analytical or operational sections of the breath analysis instrument. Such change does not require reapproval of the breath analysis instrument.

(16) "Breath analysis instrument modification" means any alteration, variation or redesign of any part, device or electronic circuit which directly effects, alters, varies or changes the analytical and/or the operational section of the breath analysis instrument. Such modification may, at the discretion of the division of forensic science, require reapproval of the breath analysis instrument.

(17) "Breath analysis instrument update" means any advancement, augmentation, addition, or replacement of any part or device with a different specification which may or may not effect the analytical or operational sections of the breath analysis instrument. Such update may, at the discretion of the division of forensic science, require reapproval of the breath analysis instrument.

(18) "Joint commission on accreditation of hospitals" means the organization nationally recognized by that name with headquarters in Chicago, Illinois, that surveys health care facilities upon their request and grants accreditation status to any health care facility that it determines meets its standards and requirements.

(19) "Breath test specialist" means a person qualified under these rules to use a breath analysis instrument or preliminary breath tester. Depending on the person's degree of training as set forth in ARM 23.4.216, he/she may be certified as:

(a) a breath test specialist/operator;

(b) a breath test specialist/senior operator; and/or

(c) a breath test specialist/technician.

Unless the context clearly indicates otherwise, where the term breath test specialist or specialist is used alone, it encompasses all three specialties.





(20) "Laboratory" means the division of forensic science.

(21) "Manufacturer" means the actual producer of the breath analysis instrument, associated equipment, accessories and or supplies.

(22) "MLEA" means Montana law enforcement academy.

(23) "NHTSA" means national highway traffic safety administration.

(24) "POST council" means police officer standards and training advisory council of the Montana board of crime control.

(25) "Preliminary breath tester" or "PBT" means any device meeting the definition of ARM 23.4.201(7)(b). Where the context clearly indicates, PBT also means preliminary breath test.

(26) "Preservative" means any chemical which inhibits the development of bacterial growth in a collected blood sample.

(27) "Probable cause test" means any analysis of the breath using preliminary breath testers or any approved field sobriety or approved psycho-motor maneuver designed to indicate the presence of or demonstrate the influence of alcohol or other intoxicating substances.

(28) "Sample" means blood, breath, urine or other bodily substances to be analyzed for the presence of drugs and/or alcohol pursuant to this subchapter. All samples must be of sufficient volume so that complete analysis may be performed.

(29) "SFST/HGN" means standardized field sobriety testing/horizontal gaze nystagmus.

(30) "Supply" means any item which is consumed during one or more test modes of the breath analysis instrument or associated equipment, i.e., simulator solution, mouthpieces, test record cards.

(31) "Test", in reference to a breath analysis, means a full and complete analysis of a properly delivered breath sample. Such analysis is to be considered complete when the breath analysis instrument has executed its prescribed program, a final result is obtained and a printed record is produced by the breath test instrument. All breath analysis must be performed in accordance with the procedures set forth by the forensic science division. In reference to other biological sample analysis, a test shall be defined as a full and complete analysis of the received sample or samples. A test of the sample may consist of more than one analysis of the submitted sample or samples in accordance with the procedures set forth by the forensic science division.

(32) "Vendor" means any company or representative of a manufacturer responsible or involved in the sale and/or marketing of breath analysis instrumentation, associated equipment, accessories, and/or supplies. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; AMD, 1991 MAR p. 1281, Eff. 7/26/91; AMD, 1995 MAR p. 119, Eff. 1/27/95; AMD, 1995 MAR p. 2805, Eff. 12/22/95.)

23.4.202 CERTIFICATION (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.203 EXEMPTIONS (1) The following are exempt from the certification required by this subchapter:

(a) all clinical and hospital laboratories under the direct supervision of a pathologist or certified medical technologist which are either licensed by the Montana department of health and environmental sciences or accredited by the college of American pathologists, the joint commission on accreditation of hospitals, or some other similar health accrediting authority;

(b) a laboratory operated by the department. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88.)

23.4.204 SUSPENSION OR REVOCATION OF CERTIFICATION (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.205 TYPES OF BREATH-TESTING CERTIFICATION (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.206 RECERTIFICATION OF PERSONS PERFORMING BREATH (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.207 BREATH TEST RECORDS (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.208 REPORTING BREATH TEST RESULTS (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.209 BREATH ANALYSIS INSTRUMENTS (1) All models of breath analysis instruments used to administer testing according to 61-8-402, MCA, must be approved by the division. The models operated by certified operators and/or senior operators prior to and on the effective date of this rule are deemed approved by the division. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; AMD, 1991 MAR p. 1281, Eff. 7/26/91.)





23.4.210 SURVEYS AND PROFICIENCY TESTS (1) Equipment and records used by nonexempt certified persons or persons applying for certification for blood testing are subject to on-site inspections by representatives of the division.

(2) The person shall accept from the division for analyses periodic evaluation samples and participate in a national blood alcohol proficiency testing program (i.e., program conducted by the college of American pathologists).

(3) A copy of the results of evaluation sample analysis and proficiency tests shall be sent to the division. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88.)

23.4.211 BLOOD AND URINE TEST RECORDS (1) All nonexempt persons performing blood and urine tests and/or analyses shall maintain the following records:

(a) proof of certification;

(b) records of tests performed and the results; and

(c) records of maintenance of instrumentation. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88.)

23.4.212 BREATH ANALYSIS INSTRUMENTATION AND ASSOCIATED EQUIPMENT (1) All manufacturers/vendors of breath analysis instruments, associated equipment, and supplies are required to submit such breath analysis instrumentation, associated equipment, or supplies to the division of forensic science for formal state approval prior to introduction into the state of Montana.

(2) All breath analysis instruments which have met the approval criteria established by the division of forensic science shall be kept on file at the division of forensic science.

(3) All associated equipment, and supplies which have met the approval criteria established by the division of forensic science shall be kept on file at the division of forensic science.

(4) The division of forensic science reserves the right to withdraw the approval status of any breath analysis instrument, associated equipment, or supply, or the manufacturer/vendor's approval to market said product, if the manufacturer/vendor fails to comply with the provisions set forth in the approval criteria or regulations pertaining to the manufacturers/vendors responsibilities to the state of Montana.

23.4.202 CERTIFICATION (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

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23.4.206 RECERTIFICATION OF PERSONS PERFORMING BREATH (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

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23.4.208 REPORTING BREATH TEST RESULTS (IS HEREBY REPEALED) (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88; REP, 1991 MAR p. 1281, Eff. 7/26/91.)

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23.4.210 SURVEYS AND PROFICIENCY TESTS (1) Equipment and records used by nonexempt certified persons or persons applying for certification for blood testing are subject to on-site inspections by representatives of the division.

(2) The person shall accept from the division for analyses periodic evaluation samples and participate in a national blood alcohol proficiency testing program (i.e., program conducted by the college of American pathologists).

(3) A copy of the results of evaluation sample analysis and proficiency tests shall be sent to the division. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88.)

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(a) proof of certification;

(b) records of tests performed and the results; and

(c) records of maintenance of instrumentation. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1988 MAR p. 275, Eff. 2/12/88.)

23.4.212 BREATH ANALYSIS INSTRUMENTATION AND ASSOCIATED EQUIPMENT (1) All manufacturers/vendors of breath analysis instruments, associated equipment, and supplies are required to submit such breath analysis instrumentation, associated equipment, or supplies to the division of forensic science for formal state approval prior to introduction into the state of Montana.

(2) All breath analysis instruments which have met the approval criteria established by the division of forensic science shall be kept on file at the division of forensic science.

(3) All associated equipment, and supplies which have met the approval criteria established by the division of forensic science shall be kept on file at the division of forensic science.

(4) The division of forensic science reserves the right to withdraw the approval status of any breath analysis instrument, associated equipment, or supply, or the manufacturer/vendor's approval to market said product, if the manufacturer/vendor fails to comply with the provisions set forth in the approval criteria or regulations pertaining to the manufacturers/vendors responsibilities to the state of Montana.

report forms along with copies of all breath analysis report forms. All reports will be sent to the division of forensic science on a monthly basis.

(h) Failure to file a copy of the report with the division of forensic science, does not invalidate the field certification, or any subject analysis performed at that location, if the report is on file at the testing location.

(i) A proper field certification prior to any subject test and a proper field certification following a subject test shall create the inference that the breath analysis instrument was in proper working order at the time of the subject test.

(j) A breath analysis instrument's field certification shall be considered valid for seven (7) days forward from the date of a proper field certification.

(2) All devices meeting the definition of "associated equipment" contained in ARM 23.4.201(7)(b), shall be field certified for accuracy at least once every thirty-one (31) days by a breath test specialist who has received training approved by the division in the proper methods for conducting such analyses.

(a) A PBT's field certification shall consist of a series of no less than two (2) analyses using an ethyl alcohol/water or ethyl alcohol/gas standard approved by the division.

(b) A field certification is valid when the results of the approved ethyl alcohol standard test is at target value plus or minus one hundredth (.01) gram per two hundred and ten liters. The results of the field certification must be recorded and maintained in the agency's files.

(c) Results of a field certification analysis outside the range specified in ARM 23.4.213(2)(b) shall be confirmed by using a fresh/new standard. If the test results are still out of the specified range, the PBT will be removed from service.

(d) A field certification shall be performed whenever a new device is placed in service or when a device is returned to service. The field certification results must be on file with the agency before the PBT can be used for subject testing.

(e) The individual law enforcement agencies using PBTs shall maintain a record of the field certifications of each individual device. Such record shall include but not be limited to: the date of the field certification, the serial number of the PBT, the results obtained, and the name of the individual conducting the analysis.

(f) A PBT's field certification shall be considered valid for thirty-one (31) days from the date of a proper field certification. (History: Sec. 61-8-405(6); IMP, Sec. 61-8-405(6); NEW, 1991 MAR p. 1281, Eff. 7/26/94; AMD, 1995 MAR p. 2805, Eff. 12/22/95.)





23.4.214 LABORATORY CERTIFICATION (1) All breath analysis instruments shall be returned to the division of forensic science on an annual basis for a laboratory certification. Such certification shall consist of, but not be limited to:

(a) A field certification shall be performed to establish current status of the breath analysis instrument.

(b) A complete analysis of the breath analysis instruments electronic functions and settings.

(c) A series of controlled ethyl alcohol solutions shall be analyzed with an accuracy requirement of +/- 5% (.005) on all target values.

(d) All updates, modifications, or changes which have been approved by the division of forensic science may be installed.

(e) A review of the breath analysis instruments sensitivity for the detection of any interfering substances.

(2) A record of the laboratory certification report shall be kept on file at the division of forensic science.

(3) All new breath analysis instrumentation must receive a laboratory certification prior to placement in the field. Any breath analysis instrument sent to another location other than the division of forensic science, or approved repair facility within the state of Montana for maintenance or repair is required to receive a laboratory certification from the division of forensic science prior to the unit being placed back into service.

(4) All breath analysis instruments received from the division of forensic science either after the laboratory certification or after repair must have a field certification performed by the breath test specialist/senior operator or authorized designee designed as set forth in ARM 23.4.213 prior to analysis of any subjects.

(5) The results of the laboratory certification shall be placed on file with the division of forensic science and a copy of the laboratory certification shall be filed with the testing location. Failure to file with the testing location does not invalidate the laboratory certification, or any subject analysis performed at that location, if such certification is on file with the division of forensic science. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.215 QUALIFICATION OF BREATH ANALYSIS LOCATION (1) All locations performing breath analysis must have one or more breath test specialist/senior operator responsible for the care, maintenance and field certification of the unit. The specialist/operator does not have to be a member of the department which has the physical placement of the unit.

TABLE 1. TEST DATA INTOXIMETERS, INC. ALCO SENSOR III S/N 9276

| Test | Test Data | | | | | | | | | | | | | Meets Requirements |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| (1 & 2) Precision/ Accuracy | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | M | S.D. | S.E. | |
| at 0.05 BAC | .051 | .051 | .050 | .050 | .050 | .050 | .050 | .050 | .050 | .049 | .050 | .001 | 0 | |
| at 0.10 BAC | .099 | .100 | .100 | .100 | .100 | .100 | .099 | .100 | .099 | .098 | .100 | .001 | 0 | Yes |
| at 0.15 BAC | .149 | .149 | .148 | .147 | .145 | .146 | .154 | .151 | .151 | .150 | .149 | .003 | -0.6 | |
| (3) Alcohol Free Subjects | .001 | .001 | .001 | .001 | .000 | .001 | .001 | .000 | .001 | .000 | .000 | | | Yes |
| (5) Power Line Voltage | Battery Powered | | | | | | | | | | | | | N/A |
| at 108 VAC | | | | | | | | | | | | | | |
| at 123 VAC | | | | | | | | | | | | | | |
| (6) Ambient Temperature | | | | | | | | | | | | | | |
| at 20°C | .097 | .096 | .096 | .096 | .093 | .094 | .094 | .094 | .093 | .093 | .095 | .002 | -5.0 | |
| at 30°C | .102 | .103 | .102 | .101 | .102 | .101 | .103 | .101 | .101 | .101 | .102 | .001 | +2.0 | Yes |
| (7) Post Vibration | .101 | .100 | .101 | .101 | .100 | .101 | .101 | .100 | .100 | .100 | .101 | .001 | +1.0 | Yes |
| Electrical Safety | Less than 30 Volts | | | | | | | | | | | | | N/A |

M = Mean
S.D. = Standard Deviation
S.E. = Systematic Error (%)

## 2. TEST RESULTS - DEVICES TESTED

The device submitted for testing was the Intoximeters, Inc. Alco Sensor III. It is a hand-held, battery-powered device. Test results are given in Table 1. This device met all of the applicable requirements for mobile and non-mobile evidential breath testers.

1.5 TEST NO. 5 - POWER LINE VOLTAGE TEST

This test is not applicable to this device. This device is battery powered.

1.6 TEST NO. 6 - AMBIENT TEMPERATURE TEST

This test was carried out in accordance with Section 5.6 of the Standard.

1.7 TEST NO. 7 - VIBRATION TEST FOR MOBILE EBT

This test was carried out in accordance with Section 5.7 of the Standard. A Unholtz-Dickie Model TK-100-20 shake table was used for this test.

1.8 ELECTRICAL SAFETY INSPECTION

This inspection is not applicable to this device. This device is powered by less than 30 volts.

# 1. TEST PROCEDURE

All tests were carried out in accordance with the Standard for Devices to Measure Breath Alcohol, Federal Register, Vol. 38, No. 212, November 5, 1973 (hereafter called the Standard). The ambient conditions maintained for the tests were: 21-23° C, 50-70 percent relative humidity, 29-30.5 inches mercury, and operating voltage 117 ± 3 volts AC. These conditions were maintained except as otherwise required by the specific tests.

The specific tests carried out are listed below.

## 1.1 TEST NO. 1 - PRECISION TESTS USING KNOWN ETHANOL VAPOR CONCENTRATION

This test was carried out in accordance with Section 5.1 of the Standard.

## 1.2 TEST NO. 2 - ACCURACY TEST USING KNOWN ETHANOL VAPOR CONCENTRATION

This test was carried out in accordance with Section 5.2 of the Standard. The test data obtained in Test No. 1 are used for this test.

## 1.3 TEST NO. 3 - BLANK TEST USING ALCOHOL-FREE TEST SUBJECTS

This test was carried out in accordance with Section 5.3 of the Standard.

## 1.4 TEST NO. 4 - BREATH SAMPLING TEST (SECTION 5.4 OF THE STANDARD)

The National Highway Traffic Safety Administration has determined that this test requires modification. Results of this test are not reported.

# RESULTS OF THE FIRST 1982 QUALIFICATION TESTING OF DEVICES TO MEASURE BREATH ALCOHOL

A. L. FLORES

SEPTEMBER 1982

INTERIM REPORT

PREPARED FOR

U.S. DEPARTMENT OF TRANSPORTATION
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
OFFICE OF DRIVER AND PEDESTRIAN PROGRAMS
WASHINGTON DC 20590

The results from the laboratory studies and roadside testing find the AlcoSensor III to be a reliable and accurate breath screening device. Additional features which support this are that the device is capable of giving air blanks prior to the breath test. The device can be calibrated with a .10 simulator or calibration gas. A breath test can also be taken on an unconscious subject or subject not willing to blow into the mouthpiece due to the design of the sample valve by which a 1cc sample is aspirated into the fuel cell.

**ACKNOWLEDGEMENTS**

Thanks to Officer Dan Day, Mesa Police Department Traffic Unit for assistance in conducting the laboratory studies on the Alcotest tubes. Officer Day also was in charge of the Roadside Testing on the Alcotest tubes.

Thanks to Officer Don Randles, Mesa Police Department Traffic Unit for taking charge of the AlcoSensor III Roadside Testing.

NOTE: The ALCOTEST Tube mentioned in This Article ARE NOT APPROVED For MONTANA

Phil Lively

DISCUSSION

The AlcoSensor III was found to be both accurate and reproducible in the testing performed using simulated breath alcohol solutions. Ten simulated breath samples were tested with five tests performed at two different alcohol concentrations. The Z error was negligible and well within the accuracy limit of the Intoxilyzer itself at a .01% BAC. With the target values of the solution determined by the Intoxilyzer to be .016 and .048, the mean values obtained by the AlcoSensor III were .016 and .048. The reproducibility calculated for each set was .04% standard deviation.

The AlcoSensor III when tested at 4°C with a .10 simulator was found to read low with the mean result being .086% BAC. At 40°C the device was still very accurate with a mean ready of .098 on a .100 simulated breath alcohol. During the roadside testing, the officer found by keeping the device in their upper shirt pocket it would maintain the operating temperature range of 20° to 30°C. This would eliminate the error from temperature effects on calibration of the fuel cell.

The Alcotest$^{R}$ tubes were found to vary in their ability to quantitate the amount of ethanol present in the breath sample. The tubes were tested ten times on a .10 simulator, two times on a .20 simulator and two times on a .05 simulator. No tubes in any of the tests indicated a color change in excess of the blue line which according to the instructions would indicate a .10 BAC reading. On some of the tubes the .05 and .10 simulator tubes registered the same amount of color change . In other tubes the .10 and .20 registered the same amount of color change. No conclusion could be drawn for the study at varying temperatures as it was found that all tubes tested on the .10 simulator varied in the response to ethanol regardless of temperature.

The tubes that were tested at the .016 level did not register any color change which followed the instructions that a negative tube would indicate less than a .03 BAC.

Under roadside testing conditions in the 13 breath tests taken, the AlcoSensor was found to agree very closely with the Intoxilyzer results. The small differences in reading may very well be due to the time interval that elapsed between the two testings or the approximate in the part of the officer as to when to take the test during the breath sample. The officers found the AlcoSensor III to be extremely easy to use, not taking much effort on the part of the subject to give the breath test.

Twenty five tests were taken using the AlcoTest tubes. In some of the test the officers felt the subject was under the influence based upon driving and field sobriety tests although the tube gave a result below .08 . When tested on the Intoxilyzer these subjects in fact were at a level in excess of a .10 BAC. The officers found it was more difficult to obtain a breath test using the tubes as the subject had difficulty in filling a waste bag with the breath sample.

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# A COMPARATIVE STUDY ON TWO BREATH SCREENING DEVICES, THE ALCOSENSOR III AND THE ALCOTEST.

BY

Vickie Watts, Toxicologist
Mesa Police Dept. Crime Lab
Mesa, Arizona

EXHIBIT C

23.4.220 COLLECTION OF BLOOD SAMPLES FOR DRUG AND/OR ALCOHOL ANALYSIS (1) Blood samples will be collected from living individuals only by persons authorized by current law, upon written request of a peace officer or officer of the court.

(2) The skin at the area of puncture must be thoroughly cleansed and disinfected with an aqueous solution of a non-volatile antiseptic i.e. betadine, etc. Alcohol phenolic solution may not be used.

(3) The blood sample will be deposited in a clean dry container. The container should then be capped or stoppered, sealed and the following information provided:

(a) Name of the subject,

(b) Date of the collection,

(c) Time of the collection,

(d) Paper seal to be signed and dated.

(4) All blood samples must be of sufficient volume to provide accurate and repeatable analyses. Required volumes will be dependant on the current technology employed by the division. Any submitted sample not meeting the required sample volume will not be analyzed.

(5) The division of forensic science will provide collection kits consisting of approved collection tubes and the appropriate request forms for collection of blood samples. The division of forensic science reserves the right to accept or reject any blood sample submitted in a commercially available collection kit.

(6) The approved collection tube will be one that contains a preservative, sodium fluoride or its equivalent and an anticoagulant, potassium oxalate or its equivalent. If no additive or additives are used, a statement should accompany the sample.

(7) When possible, the peace officer requesting the blood sample shall observe the collection of the sample so that he/she may attest to the sample's authenticity. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91; AMD, 1995 MAR p. 119, Eff. 1/27/95.)

23.4.221 COLLECTION OF POSTMORTEM SAMPLES FOR DRUGS AND/OR ALCOHOL ANALYSIS (1) Sampling of body substances other than blood, breath, or urine is considered valid only in postmortem cases. All postmortem body material must be obtained prior to the embalming process. The sample or samples must be taken by a physician, board certified pathologist, the county coroner or a designated representative of the county coroner.

(2) Whenever a postmortem blood sample is collected, all practical precautions to ensure a representative, uncontaminated sample must be employed. Care must be taken to avoid contamination of the sample by gastrointestinal contents if it is necessary to sample heart blood. There must be adequate mixing of the blood sample before withdrawal. If a heart blood





sample is taken without autopsy, precautions against dilution of the blood with pleural or pericardial fluids must be employed.

(3) In any postmortem collection of blood, the primary sample for analysis shall be femoral blood. If such sample is unattainable, the next sample of choice shall be heart blood. If a heart blood sample is unattainable, the sample of choice will be urine. Any sample to be drawn will be an uncontaminated sample.

(4) In the event that no fluid samples can be preserved, tissue samples may be submitted. Preferred tissue samples to be brain, liver, lung and kidney. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91; AMD, 1995 MAR p. 119, Eff. 1/27/95.)

23.4.222 through 23.4.224 reserved

23.4.225 PROBABLE CAUSE TESTS (1) Preliminary breath testers (PBTs)

(a) All models and/or types of PBTs used for development of probable cause evidence must be approved by the division. A list of approved PBTs will be maintained at the division.

(b) Individuals conducting PBTs as authorized by statute must be certified as breath test specialists.

(c) Individuals certified as breath test specialists pursuant to ARM 23.4.216 on or before July 1, 1995 are deemed to be PBT-certified after attending a PBT operation course approved by the division of forensic science. Individuals certified as breath test specialists after July 1, 1995 are deemed to be PBT-certified.

(d) Individuals responsible for field certification of the PBT must receive training approved by the division outlining the procedures for conducting such certifications.

(e) All PBT results will be recorded in a manner approved by the division of forensic science. (History: Sec. 61-8-405 MCA; IMP, 61-8-405 MCA; NEW, 1995 MAR p. 2805, Eff. 12/22/95.)

Sub-chapters 3 and 4 reserved

NEXT PAGE IS 23-345

23.4.217 RECERTIFICATION OF BREATH TEST PERSONNEL (1) The division of forensic science must approve any course given needed for the recertification of the breath test specialist/operator. The division of forensic science shall place a copy of the recertification exam in the custody of the breath test specialist/senior operator.

(2) The breath test specialist/senior operator shall have the responsibility of presenting the approved recertification course and monitoring the examination of all personnel seeking recertification. The division of forensic science may, if it determines that the circumstances warrant, give recertification training to any individual(s) seeking recertification directly from the division.

(3) All examinations shall be sent to the division of forensic science for grading.

(4) Permits shall be issued to all individuals successfully completing the breath test specialist recertification training. Such permit shall have the specialist's certification date displayed. The permit expires the last day of the month, in the following year, in which the specialist was certified.

(5) All breath test specialist/operators shall be recertified on an annual basis by attending a recertification course approved by the division.

(6) In addition to the annual recertification, all breath test specialist/senior operators must be recertified by a representative of the division of forensic science once every two years on a schedule to be determined by the division.

(7) Training may include, but is not limited to, the following subjects: toxicology and pharmacology of alcohol in the human system, breath analysis instrument theory, breath analysis instrument operation, current legal decisions, training techniques and any area deemed appropriate by the division of forensic science.

(8) The breath test specialist/senior operator is still required to submit to annual examination based on the material he/she is presenting to the breath test specialist/operators in addition to the bi-annual recertification conducted by the division of forensic science.

(9) A permit will be issued to all individuals successfully completing the senior operator's recertification training. Such notification shall have the specialist's certification date displayed. Certification expires the last day of the month, in the following year, in which the specialist was certified.

(10) The breath test specialist/technician is only required to fulfill the recertification requirements of a breath test specialist/senior operator. The technician's proficiency will be assessed through monitoring of his/her performance.

(11) All breath test specialists must successfully pass a recertification course within 90 days after his/her expiration date.





(12) If a breath test specialist fails to recertify within the specified time frame, he/she must either attend an initial certification course or file a request, in writing, for an exemption. Exemption requests will be reviewed and a decision will be presented to the individual in writing.

(13) If a breath test specialist fails the recertification examination he/she may retake the examination within 30 days of notification of failure. After a second test failure, all candidates for recertification must retake the appropriate breath test specialist course. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91; AMD, 1995 MAR p. 119, Eff. 1/27/95; AMD, 1995 MAR p. 2805, Eff. 12/22/95.)

23.4.218 PERMITS (1) The division of forensic science shall issue permits to perform analysis of a person's breath for alcohol to individuals who qualify under these rules. No individual may perform a breath analysis for alcohol pursuant to 61-8-402, MCA, without a current permit. Individuals holding permits issued by the division of forensic science shall perform only those functions designated by that permit.

(2) Permits issued shall expire the last day of the month, in the following year, in which the specialist was certified, unless revoked prior to that date. Individuals seeking renewal or upgrading of a permit must demonstrate to the satisfaction of the division of forensic science such competency and ability to warrant renewal or upgrade of the permit. The division of forensic science has the right to deny or delay the issuance or renewal of any permit for good cause. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.219 REVOCATION OF PERMITS (1) The division of forensic science may deny, deny renewal of, suspend, or revoke the permit of any permit holder:

(a) Who obtained such permit falsely or deceitfully;

(b) Who fails to comply with any section of the rules and regulations;

(c) Who as a breath test specialist/operator fails to demonstrate that he or she can properly carry out the duties and responsibilities of the issued permit, or

(d) Who as a breath test specialist/senior operator and/or breath test specialist/technician fails to carry out the responsibilities incumbent of that permit.

(2) The division of forensic science has the right to revoke, suspend, or deny any permit for good cause. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91.)

(2) All locations must have a sufficient number of breath test specialists to warrant placement. The number of breath test specialists for any location will be based on the total number of specialist/operators and specialist/senior operators within the county.

(3) All locations will provide an adequate operational environment for the breath analysis instrument. If a location fails to do so the division of forensic science shall have the right to place that location on suspension, and if the location does not meet approval within ninety (90) days of notification, that location shall have its certification revoked and if the breath analysis instrumentation is state-owned such breath analysis instrumentation will be removed from that location.

(4) All locations are required to submit copies of all field certification reports and all breath analysis reports on a monthly basis. Failure to maintain this reporting schedule may result in the revocation of a testing location's certification and the revocation of the breath test specialist/senior operator's certification. Failure to file the above reports does not invalidate any subject analysis performed at that location.

(5) Locations wishing approval as a certified test location must submit an application to the division of forensic science. The division will review the application and will respond with its decision in writing to the submitting location. Applications will be available through the division of forensic science. All locations established prior to April 1, 1990 are exempt from the application requirement and are granted certification status.

(6) Temporary testing locations may be designated upon the request of a law enforcement agency if the division of forensic science feels that such location is warranted. Such location must conform to all certification specifications required for a permanent testing location.

(7) All locations must have an equipment control form and a signed user agreement on file with the division of forensic science to maintain their certification status. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91.)

23.4.216 QUALIFICATIONS OF PERSONNEL (1) An individual meets the qualifications for a breath test specialist/operator permit by:

(a) Attending an approved training course conducted by personnel from the division of forensic science.

(b) Satisfactorily demonstrating knowledge of the principles of breath test analysis through discussion and examination.





(c) Satisfactorily demonstrating competent operation of the breath analysis instrumentation.

(2) A permit shall be issued to a person successfully completing the training. Such permit will have the specialist's expiration date displayed.

(3) An individual meets the qualifications for a breath test specialist/senior operator permit by:

(a) Holding a valid breath test specialist permit for at least one year. A special exemption for this requirement may be obtained through the division of forensic science.

(b) Attending an approved breath test specialist/senior operator training course conducted by personnel from the division of forensic science.

(c) Satisfactorily demonstrating knowledge of the principles of breath test analysis through discussion and examination.

(d) Satisfactorily demonstrating competent operation of the breath analysis instrumentation.

(e) Satisfactorily demonstrating competent preparation and analysis of controlled solutions utilized in field certifications.

(4) A permit shall be issued to a person successfully completing the training. Such permit will have the specialist's expiration date displayed.

(5) A person meets the qualifications for breath test specialist/technician by:

(a) Holding a valid breath test specialist/senior operator permit for at least one year. A special exemption for this requirement may be obtained through the division of forensic science.

(b) Attending an approved breath test specialist/technician training course conducted by personnel from the division of forensic science, or an approved manufacturers course in technical repair and maintenance.

(c) Satisfactorily demonstrating knowledge of the technology utilized by the specific breath analysis instrument for which the individual wishes to hold a permit.

(d) Satisfactorily demonstrating competency in problem solving and repair of specific breath analysis instrument.

(6) The breath test specialist/technician permit is held in addition to the breath test specialist/senior operator permit. An individual holding a breath test specialist/technician permit is required to continue the duties and responsibilities of a breath test specialist/senior operator. (History: Sec. 61-8-405(6) MCA; IMP, Sec. 61-8-405(6) MCA; NEW, 1991 MAR p. 1281, Eff. 7/26/91.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. #7
DATE 1-20-97
BILL NO. SB 106

SB 106
EL
1-20-96
Doherty
SEP - 3 1996

IN THE EIGHTH JUDICIAL DISTRICT, CASCADE COUNTY

| | | |
|---|---|---|
| STATE OF MONTANA, | ) | CAUSE NO. ADC-96-144 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER** |
| | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

The parties have filed a series of motions *in limine*. An evidentiary hearing on these motions was conducted by the Court on August 6 and 7, 1996. At the hearing, the State requested pre-trial rulings on the admissibility of certain evidence. The State has asked this Court to rule:

1. That the Preliminary Breath Test (Alco Sensor III) be admitted for use by the State of Montana in its case in chief;

2. That certain statements and conversations between Officer Hickman and [redacted], following his detention, be admitted;

3. That evidence of the prior "bad acts" of Officers Hickman and Church be excluded from the evidence.

Defendant [redacted] objects to the motions of the State and requests:

1. That the portable breath test results be excluded from

evidence.

2. That statements obtained from the Defendant following his detention be suppressed.

3. That charges currently pending against him be dismissed.

The Court having taken evidence from the parties, having heard oral argument, and having reviewed the law relevant to the issues raised in these proceedings, now enters the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. On November 4, 1995, [redacted] was arrested by Great Falls Police Officer Christopher Hickman and cited with violation of 61-8-401, M.C.A., for operating a motor vehicle while under the influence of alcohol.

2. Approximately 20 minutes before he arrested [redacted] Hickman observed [redacted] standing by a roadway in a Great Falls residential area with some other individuals. (TR. 190). Hickman spoke with [redacted], and [redacted] advised him that everything was fine, and that they were just trying to get a friend of [redacted] indoors. Hickman stated that he could understand [redacted] clearly when he spoke with him. (TR. 188; TR. 210).

3. After Officer Hickman left [redacted] by the side of the roadway, he drove to a location two blocks away, and ran the license plate of the vehicle near which [redacted] had been standing. He learned that the vehicle was registered to U.S. Marshal William

[redacted] and his wife. (TR. 214).

4. Officer Hickman admitted "laying in wait" for [redacted], testifying that he waited in his patrol car with the intent that if Strizich got into his vehicle and drove it, he would arrest him. (TR. 208-209).

5. While he waited for [redacted] to operate his vehicle, Hickman called Great Falls Police Sergeant Greg Church on his cellular phone and asked him to come to the location where Hickman was parked waiting for [redacted]. Hickman told Church what route to take and to keep his headlights off so as not to alert [redacted]. When Church arrived, Hickman told Church he had "a big fish DUI." (TR. 206, 215-216).

6. After waiting for 15 to 20 minutes, Hickman observed [redacted] operating his vehicle. He followed the [redacted] vehicle for approximately 7 blocks, before stopping him and eventually arresting him for DUI. (TR. 218).

7. Hickman testified that during the entire period of time that he followed [redacted] vehicle -- for approximately 7 blocks, through two traffic controlled intersections, and after two left-hand turns -- [redacted] made no unsafe driving maneuver. (TR.209, 218).

8. Hickman testified that [redacted] did not weave, did not exceed the speed limit, did not cross the center line, did not make excessively wide turns, did not brake suddenly, did not brake at green lights, did not fail to stop at a stop sign, and did not fail

to yield the right of way. (TR. 220-222). Hickman has been trained in night-time DUI detection, and these are the cues he looks for in determining whether a person is driving under the influence of alcohol. (TR. 218).

9. Hickman stopped [redacted] in an alley, had a conversation with him, asked him to perform field maneuvers, and asked him to take a Preliminary Breath Test (PBT). [redacted] complied with these requests. (TR. 194; TR. 197-198; TR. 200-201).

10. With respect to the detention and arrest of [redacted], Hickman testified as follows in a colloquy with the Court at TR. 195, ls. 22-25, and TR. 196, ls. 1-7:

| | |
|---|---|
| OFFICER HICKMAN: | It was an investigation. It was not interrogatory in nature. And - |
| THE COURT: | Was he free to go? |
| OFFICER HICKMAN: | He was under investigation, so I couldn't allow him to drive off. |
| THE COURT: | He was under arrest? |
| OFFICER HICKMAN: | I would say no. |
| THE COURT: | But he was not allowed to go? |
| OFFICER HICKMAN: | Not under the circumstances, no. |

At TR. 224, ls. 5-19, this further exchange between the Court and Officer Hickman continued:

| | |
|---|---|
| THE COURT: | Would you think if you were in [redacted] |

position that you were arrested if you did not have the freedom to leave?

OFFICER HICKMAN: Well, in my position, I guess I would understand that it would be an investigatory stop, which I don't classify as an arrest.

THE COURT: What would a citizen think if you were a citizen?

OFFICER HICKMAN: Probably that he's not free to go.

THE COURT: That he's under arrest. What would you have done if he'd tried to leave?

OFFICER HICKMAN: Detained him.

Finally, the following exchange occurred between defense counsel and Officer Hickman at TR. 226, commencing at line 4 and concluding at TR. 227 at line 3:

(BY DEFENSE COUNSEL)
QUESTION: And you were getting or attempting to get incriminating evidence from him [redacted] at that point in time; isn't that correct?

(OFFICER HICKMAN)
ANSWER: No.

QUESTION: I would like you to refer to page 136 of your deposition, Officer Hickman. And do you remember when your deposition was taken, you had raised your hand; isn't that correct?

ANSWER: Correct.

QUESTION: Officer, and you're under oath?

ANSWER: Yes.

QUESTION: And you were told to tell the truth?

ANSWER: Yes.

QUESTION: And that was in February of 1996; wasn't that correct?

ANSWER: Yes.

QUESTION: And you told the truth while during your deposition, didn't you?

ANSWER: Yes.

QUESTION: And you were asked the question, "And you are getting incriminating evidence from him at that point in time, aren't you, Officer; you are, aren't you?". And your answer?

ANSWER: "Sure. Okay."

11. Hickman did not give [redacted] any Miranda warning while speaking with him and having him perform the field sobriety tests and the PBT in the alley way. The Miranda warnings were not given to [redacted] until after he was taken to police headquarters. (TR. 195-196; 222-223).

12. At the evidentiary hearing on defendant's motions *in limine* on August 6-7, 1996, the State called Mr. Norm Fort, a criminalist employed by Ventura County, California, to testify concerning the use of preliminary breath tests (PBT's), such as was utilized in the field in this case.

13. Mr. Fort has never testified outside the State of California, and appeared in this cause at the expense of the State of Montana. (TR. 22).

14. Mr. Fort has conducted studies involving the fuel cell device contained in such devices as the Alco-Sensor III. (TR. 45). However, he has not published the results of his studies in a scientific journal. He did cause some of his data to be printed in a newsletter published by the International Association for Chemical Testers in March of 1995. (TR. 91).

15. While Mr. Fort has conducted studies on the reliability of PBT's, he acknowledged that field tests utilizing hand-held PBT's show a broader range of variance than do controlled test devices generally admissible into evidence. Specifically, Mr. Fort acknowledged that the results of field tests can be influenced by a broad range of factors, including but not limited to:

a. user physiology;

b. variance in the particular instruments; and

c. operator-induced deviations. (TR. 103).

16. During Mr. Fort's testimony, counsel for the State conceded that "there is a whole laundry list" of things that could go amiss during the field use of a PBT device. (TR. 120).

17. Mr. Fort testified that a PBT such as that used by the police officer in this case can have a printout capability which, if utilized, would provide a written result of the PBT given. The PBT utilized by Officer Hickman in this case was not equipped with such a printout device, so there is no written documentation of the

PBT results obtained by Officer Hickman. (TR. 73-74).

18. Mr. Fort admitted that when he trains police officers to use PBT's, he advises them to give the test twice. He admitted that in this case, Officer Hickman gave the PBT only one time in the field. (TR. 111).

19. Mr. Fort gave no ultimate opinion on the reliability of the PBT, because the State failed to lay a proper and sufficient foundation for such an opinion. (TR. 36 and 122). Under these circumstances, the Court finds the testimony of Mr. Fort in support of the admissibility of PBT evidence unpersuasive.

20. The State also called Mr. Phillip Lively, Director of the Breath Analysis Program for the Division of Forensic Sciences for the State of Montana. (TR. 58). Mr. Lively was the primary author of the Montana Administrative Regulations which relate to the utilization of PBT's, including the Alco-Sensor III device used by Officer Hickman in this case. (TR. 65).

21. Mr. Lively authored that provision of the Montana Administrative Regulations which states that the PBT equipment shall be used "for probable cause only" (TR. 66), and he admitted that he has no knowledge of any cases wherein the results of PBT's have been introduced into evidence for any purpose other than establishing probable cause. (TR. 76).

22. Mr. Lively acknowledged that the PBT results and the more sophisticated Intoxilyzer 5000 results are comparable in clinical conditions only, and he further acknowledged that the term

"clinical conditions" does not include field tests where the policeman and driver are on the side of the road utilizing the device. (TR. 72-73).

23. According to Mr. Lively, even when it is properly calibrated and correctly used, a PBT device can have a margin of error of plus or minus 10 percent. (TR. 79).

Based upon the foregoing Findings of Fact, the Court enters the following Conclusions of Law on the issues presented for this Court's determination:

## CONCLUSIONS OF LAW

### I. Admissibility of PBT Results

A. Section 61-8-409(2), M.C.A., provides that the results of a preliminary alcohol screen test may be used for determining whether probable cause exists to believe a driver has violated Montana's DUI statutes. According to the legislative history of the statute, a PBT is a pre-arrest test for the purpose of determining whether there is probable cause to continue with a DUI investigation.

B. According to A.R.M. 23.4.201(7)(b), a PBT is certified by the Department of Justice, and is to be considered as probable cause evidence only.

C. In the recent case of Wessell v. State, 53 St. Rep. 610 (Mont. 1996), the Supreme Court held that the "test" required by §61-8-402, M.C.A., "... must be a full and complete analysis." The

Court defined this analysis as follows:

> The analysis for a breath test is considered complete when a breath sample is properly delivered, 'the breath analysis instrument has executed its prescribed program, a final result is obtained, and a printed record is produced by the breath test instrument.' Rule 23.4.201(31), A.R.M.

The Court concluded that if a full and complete analysis is not achieved as defined by the A.R.M., a valid breath test does not exist. Wessell v. State, *supra*, at 612. Thus it is clear that the only test contemplated by the statute is a full and complete analysis, and not a PBT.

D. In light of the foregoing, and given the clear law of this State concerning the extent of the admissibility of PBT's, the Court concludes that the PBT results are inadmissible in the State's case in chief against the defendant.

presented to the jury at the trial of this cause is denied.

Finally, the Defendant has filed a motion to dismiss the charges pending against him. The Motion to Dismiss is premature and is denied, at this time. Defendant may renew this motion at the conclusion of the State's case in chief.

SO ORDERED this 29th day of August, 1996.

Thomas M. McKittrick

DISTRICT COURT JUDGE

cc: Michael W. Cotter
Thomas E. Boland
David Gliko

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. # 8
DATE 1-20-97
BILL NO. SB 106

IN THE CITY COURT, CITY OF GREAT FALLS,
COUNTY OF CASCADE, STATE OF MONTANA,
BEFORE NANCY J. LUTH, CITY COURT JUDGE

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CITY OF GREAT FALLS,

PLAINTIFF,

-VS-

DEFENDANT.

---

DOCKET NO. 274829

APRIL 22, 1996
10:30 A.M.

APPEARANCES:

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ATTORNEYS FOR THE DEFENDANT

DAVE GLIKO
RANDY WINNER
CITY ATTORNEY AND ASSISTANT CITY ATTORNEY
CIVIC CENTER
GREAT FALLS, MT 59401
ATTORNEY FOR THE CITY OF GREAT FALLS

APRIL 22, 1996

10:30 A.M.

THE COURT: As I indicated, I would like to start with the issue of the PBT. Are you ready, Mr. Gliko, with your witness?

MR. GLIKO: We call Mr. Lively.

PHILLIP LIVELY, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GLIKO:

Q. Mr. Lively, would you state your name for the record?

A. My name is Phillip Lively.

Q. And Phillip, where are you employed?

A. I am employed with the Division of Forensic Science, Division of the Department of Justice.

Q. And I am going to hand you a copy of that, and can you tell us what that is?

A. It's a copy of my resume.

Q. And did you prepare that resume?

A. Yes.

Q. And did you submit that resume to me on

A. Basically what we look at, we look at approximately ten levels of testing at each .05, .10 .15 and a .2.

Q. These were tested against, what, individuals that had ingested levels of alcohol, or --

A. No, the initials were done on known alcohol standards, one we run in device called a simulator. We also take the units to the Law Enforcement Academy for cross correlation against drinking subjects versus the test they would provide in the evidential units they are trained.

That's where we assessed ease of operation, ease of samplization, and as a counterpoint also, comparative analysis between their results versus the results of an evidential.

Q. And what is the ultimate result, then, of this accuracy?

A. We felt the unit to be accurate for its application as a preliminary breath tester.

Q. How would it compare to the Intoxilyzer 5,000 that's -- I believe is the standard used in the State, approved by the Department?

MR. BOLAND: All right. We are going to try to cut to the chase. We understand this is a hearing on this particular witness, this particular issue, a matter pertaining to the admissibility of the PBT.

CROSS-EXAMINATION

BY MR. BOLAND:

Q. With that in mind, Mr. Lively, will you agree with me that the PBT is not historically and generally recognized in your profession as being an instrument where the results of that instrument are admissible in a court of law?

A. Admissible as to what degree, sir?

Q. Admissible.

A. Then I would have to disagree. The PBT results have been admissible in courts for 20 years that I have been associated with it.

Q. All right. Would you tell us when this result of a field PBT test were admitted in court for a reason other than a matter related to probable cause?

A. That is its function, probable cause.

Q. If there is no discussion of objection to format related to probable cause for the

washes, breath sprays and cough syrups contain a certain amount of alcohol and the recent placement of one of those things in the mouth of a suspect can affect the verifiability -- can affect the accuracy of the number of the PBT; is that true?

A. That is correct.

Q. Do you have any personal information about what [redacted] put in his mouth or do you know whether he put anything in his mouth for the 15 or 20 minutes before this PBT was administered?

A. Directly, no. I have no knowledge.

Q. Does that mean indirectly you have some knowledge?

A. No.

Q. Did you have in hand any writing any of the Administrative Regulations of Montana that pertain to the preliminary breath test?

A. Yes, I did.

Q. Would you tell us briefly what role you played in the drafting of those ARM's?

A. All of the ARM's from 213 on are ones I developed; the ones prior to that I have reviewed and edited.

Q. Did you testify before the legislature?

A. There was no testimony required on ARM's.

Q. I didn't mean the legislature, in a public hearing?

A. Yes, public hearings were set forth.

Q. Did you discuss the limitations of the PBT in a court of law for any matter other than probable cause findings in those public hearings?

A. No.

Q. This PBT thing, to reduce this to the simplest terms really is a probable cause testing device, isn't it, to assist the officer in determining whether there is probable cause for the arrest?

A. That is its purpose, yes.

Q. Was the Intoxilyzer 5,000 also a machine that your former place of employment sold to law enforcement people?

A. No.

Q. Okay. How many of these -- your best estimate will suffice for purposes of my question -- how many of these PBT No. 3's would you say are in the State of Montana?

A. At this point in time?

Q. Yes.

A. I would estimate probably between 70 to 80 in use at this point in time.

Q. Do you know what they -- you used to know what they cost because you sold them. What does one cost nowadays?

MR. GLIKO: I object as to relevancy.

THE COURT: Well, overruled. I mean, it's a pretrial hearing. We can get into it.

THE WITNESS: Typically a PBT of the five different models we have approved range anywhere from $350 to $650 per unit.

Q. (By Mr. Boland.) How about the particular one sitting on the desk of counsel here?

A. That one, the latest quote from the manufacturer was around $350, single unit price.

Q. Is this the one you sold when you were --

A. That's much -- an updated version of the type we carry.

Q. What I wanted to know, Mr. Lively, if you had any involvement in the purchase of these

THE COURT: I will sustain the objection. It is calling for a legal opinion.

MR. GLIKO: I have no other questions.

MR. BOLAND: One on re-cross.

RECROSS-EXAMINATION

BY MR. BOLAND:

Q. Mr. Lively, although it wasn't specific to probable cause, or non-probable cause matters, is it your testimony the State of -- courts of the State of Indiana allowed the PBT that you have described here to be admitted into court for matters other than probable cause?

A. No, as I stated, it is a probable cause device.

Q. Okay. To clarify this thing, the State of Indiana does not allow PBT results in a court of law for anything other than probable cause?

A. That is its function; is that correct.

MR. BOLAND: Thank you.

MR. GLIKO: Can I follow up on that?

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. GLIKO:

Q. Now, understanding the distinction between the use of the results for probable cause, and for use of the results in the trial, the state's case in chief, making sure that you understand and make that distinction, do you know if such results are not used in trial in the State of Indiana?

A. The results of PBT in anywhere that I have worked has been as a matter of probable cause, and -- to the same degree as the other psychomotor tests; that is its function, that is its place.

Q. Do you know if that same evidence is used in the state's case in chief at the trial of a person accused --

MR. BOLAND: Objection, asked and answered.

THE COURT: I will allow it, overruled.

THE WITNESS: As a matter of probable cause, yes, in the case in chief, I have testified to that many times within the actual trial as to its application in the probable cause area, yes.

MR. GLIKO: Thank you. No other

MONTANA EIGHTH JUDICIAL DISTRICT COURT,

CASCADE COUNTY

---

STATE OF MONTANA,

Plaintiff,

vs.

Defendant.

---

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. #9
DATE 1-20-97
BILL NO. SB106

CAUSE NO. ADC-96-144

TRANSCRIPT OF PROCEEDINGS

Cascade County Courthouse
Great Falls, Montana
August 6, 1996
10:35 A.M.

BEFORE: THE HONORABLE THOMAS M. McKITTRICK

APPEARANCES:

DAVID V. GLIKO
NED JENNINGS
City Attorneys
P.O. Box 5021
Great Falls, MT 59403
Attorneys for Plaintiff

MICHAEL W. COTTER
Cotter & Cotter, P.C.
P.O. Box 3425
Great Falls, MT 59403

THOMAS E. BOLAND
Attorney at Law
P.O. Box 2949
Great Falls, MT 59403-2949
Attorneys for Defendant

identify himself for the record, please.

A My name is Norm Fort, F-O-R-T.

Q And, Norm, where do you reside?

A I reside in Ventura, California.

Q And what's your occupation?

A I'm employed as a criminalist with the County of Ventura.

Q And how long have you been so employed with Ventura County?

A I've been employed as a criminalist with Ventura County for 31 years.

Q And what's your area of specific work there as a criminalist?

A Currently I'm assigned to the forensic alcohol section of the laboratory, and I'm actually the supervisor of that section.

Q And what particularly do you deal with in that capacity?

A Our section is responsible for both the physiological testing, we test blood and urine for alcohol content. And I'm also responsible for our breath alcohol program, including the post-arrest program as well as the preliminary breath test program. And that responsibility includes both the care and maintenance of the instrumentation as well

A Yes, sir, I have.

Q And in what capacity?

A As a criminalist for over 30 years, I've had the opportunity not only to work in a lot of different areas, including the alcohol section, toxicology controlled substance section, trace evidence, serology, so I have testified and qualified as an expert witness in each of those areas.

If we consider that my current assignment is to the forensic alcohol program, and further consider that we do have to go to court quite frequently, I have appeared in court and testified and qualified as an expert in that area something in excess of 1,000 times. And that would be just in the criminal courts.

Q And what state have you so qualified and testified?

A I have testified primarily in Ventura County. I have also testified and qualified in a limited number of counties in California. And actually, this is my first appearance outside the state of California.

Q And specifically have you testified concerning the use of the Alko-Sensor III?

in direct conflict with the state statutes, which we have argued and believe, then they are void.

MR. BOLAND: Your Honor, could I try and take the cart before the horse here? Whether counsel for the City knows it or not, in order to get scientific evidence before the Court, you must meet the Daubert rule. The California Court inaccurately referred to the Frye test for scientific evidence.

The Supreme Court in the Daubert case gave them the test. If this witness cannot answer affirmatively to the four steps set out by the U.S. Supreme Court in Daubert, his testimony doesn't come in. And he can't -- he cannot answer affirmatively to the question, is this technique or device generally accepted in the relevant scientific community? That's the test. When the answer is no, that's not admissible in court, his testimony does not come in. And the whole bloody thing was a waste of time and money.

THE COURT: What we're going to do is recess for lunch. Get into the Daubert rule, will you, when you come back?

MR. GLIKO: Your Honor, I don't agree that the Daubert rule is binding in the State of

Montana. I would cite the Court --

THE COURT: Is it from the United States Supreme Court?

MR. BOLAND: Yes, Your Honor, it's the United States Supreme Court.

THE COURT: I'll take a look at it. If you have some contrary law, I'll look at that. But we'll do that at 1:30.

MR. GLIKO: Thank you, Your Honor.

(WHEREUPON, a noon recess was taken.)

THE COURT: Just to refresh my recollection, where we stopped, we were still discussing the foundational questions for the expert. And counsel for the defendant raised the issue of whether or not he was complying with the Supreme Court decision, or could comply with the Supreme Court decision. So we'll go from there.

MR. GLIKO: Your Honor, I would like to speak to that point.

THE COURT: Go ahead.

MR. GLIKO: Your Honor, the case of Daubert was cited, and I have made a copy of that decision. I would represent to the Court that that

MR. GLIKO: Thank you.

Phillip Lively, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GLIKO:

Q Would you state your name for the record, please?

A My name is Phillip Lively -- L-I-V-E-L-Y.

Q And how are you employed?

A I'm employed with the Division of Forensic Science through the Department of Justice.

Q And how long have you been so employed?

A I began work there in January of 1989.

Q And what is your capacity there?

A I am the director of the breath analysis program for the State of Montana through the Division of Forensic Science.

Q Can you give us your formal educational qualifications?

A Qualifications include both formal education and training received through employment. I graduated in 1979 from Indiana University, holding a degree in anthropology and

Intoxilyzer, are you aware the Intoxilyzer III -- excuse me. Strike that.

Are you aware that the Alco-Sensor III is approved and listed in the Federal Register for evidentiary results?

A Yes, sir.

Q And what is the significance of that, if you know?

MR. BOLAND: Objection, calls for a legal conclusion.

THE COURT: Sustained.

Q (By Mr. Gliko) Now then, you were -- were you involved in the adoption of the Administrative Rules for the use of the Alco-Sensor -- or I should say the preliminary breath screening devices, which includes the Alco-Sensor III, for the State of Montana?

A I was the primary author of those Administrative Rules.

Q And you were -- you then were involved with the changes and additions to the rule, particularly dealing with the accessory instruments?

A Yes, sir.

Q And you were aware that the last phrase,

subdivision b I think of that rule states that the Alco-Sensor, or the preliminary breath testing equipment shall be used for probable cause only. The phrase there I think that can be quoted is "probable cause only." You're aware of that?

A Yes, sir.

Q And you authored that?

A Yes, sir.

Q And how was the rule -- you authored it. But was it just -- did it go on the books then or what happened to your rule after you authored it?

A In the initial authoring, which was in 1991, part of the wording was left out. The wording was then subsequently changed and tendered beginning in 19 -- beginning the first part of 1995, I believe, to firmly establish probable cause for the PBT. The original ruling had some inferences to another device known as an Interlock, which we then struck from the 1991 rule.

Q Okay. But didn't your authored rule then go to some board or to some entity for approval?

MR. BOLAND: Objection, leading.

THE COURT: Sustained.

Q (By Mr. Gliko) Well, let me ask you again, what happened to the rule that you authored

after you wrote it out?

A When we do write or design entity Administrative Rules, it is then given to the Attorney General's Office. The Attorney General's Office then submits it to the Secretary of State.

Q And then it appears in the Administrative Rules as we know it?

A Well, it's -- then a hearing, a public hearing is held, and at the end of that public hearing, notification given back to the Secretary of State, and then would be promulgated at some point after that.

Q Who promulgates it?

MR. BOLAND: Objection, beyond this witness's stated foundational qualifications.

MR. GLIKO: Well, only if he knows, Your Honor.

THE COURT: If you know.

THE WITNESS: I'm not sure who actually promulgates.

Q (By Mr. Gliko) Okay. Now then, at the time that you drafted the rule that we've just been discussing, accessory equipment, was the statute with regard to the use of the preliminary breath testing equipment, what is it, 61-8-409, had that

been enacted by the Legislature?

A Not at that time, no.

Q So you enacted a rule or authored a rule before the statute authorizing the use of the instrument was enacted?

MR. BOLAND: Objection, leading and argumentative.

THE COURT: Sustained. Leading.

MR. GLIKO: I actually think that's been answered so I will not pursue that. But --

THE COURT: Don't lead then. Let's move it along.

Q (By Mr. Gliko) Well, having -- you are acquainted with Section 61-8-409, are you not?

A Yes, I am.

Q You're acquainted with the fact that --

THE COURT: Don't lead, Mr. Gliko. Just ask him the question. You're suggesting the answer in your question. That's leading.

Q (By Mr. Gliko) Do you know what the penalty for refusing the PBT in the statute 61-8-409 provides?

MR. BOLAND: Objection, beyond this witness's scope of knowledge. And certainly beyond the foundational qualifications that have been laid

so far.

THE COURT: Sustained.

Q (By Mr. Gliko) Let me ask you then, what is your understanding of the use of the result of the preliminary breath test in a court of law in the case in chief?

MR. BOLAND: Same objection, Your Honor. These are legal matters that can be handled by the Court.

THE COURT: I have no idea where you're going, Mr. Gliko.

MR. GLIKO: Well, he's authored a rule that --

THE COURT: Why don't you ask him -- if you wanted to ask him what the rule means to him, that's fine. But as far as the case in chief goes and the results and that, that's not up to him.

Q (By Mr. Gliko) All right. Let me ask you then what your understanding of the rule that we've just been discussing is.

A Regarding the rule concerning accessory and probable cause only?

Q Yes.

A Is that correct?

The primary purpose of that rule being

established was at the time that we created that rule, there was no statutory mention or acceptance of PBT's. PBT's were being used in the state at that time. We felt it necessary to create some type of marked difference between a preliminary breath test device and a quote, unquote, in our terms, evidencial breath test device or the Intoxilyzer, the purpose being that under the implied consent, the confusion could be that if an individual is asked to take a breath test along the side of the road it could be confused with the issue of whether or not they still needed to take a breath test when they arrived at the police station.

By attempting to make some type of differentiation between what a PBT provides and what an Intoxilyzer provides, we hoped to avoid any type of confusion in a refusal type of situation. There are -- if it's a probable cause only tool, such as not only the PBT but the psycho motor turn, the one-legged stand, walk and turn, that they had every right to refuse to take those. But they did not have the -- I hate to say the right to refuse, but they have the right to refuse to take the one under 402.

The term establishing this probable cause only was in an effort to make this differentiation clear. So that if an individual did refuse the Intoxilyzer, they could not fall back and say, "I already took the breath test. I'm not taking another one." So that we could point out the difference between the two. That was the original intent. And still the intent of that is for differentiating between the two, not to establish when or where the results could be used.

Q Not to establish where in the court proceedings the evidence would be used, you're saying?

A That's correct.

MR. BOLAND: Objection, leading and argumentative.

THE COURT: Sustained. Mr. Gliko, you don't have to summarize these questions for me. I'm listening.

MR. GLIKO: Okay. Your Honor, could I ask for a couple of minutes?

THE COURT: What for?

MR. GLIKO: Well, to -- I'm not certain actually that I have any more questions of this witness, but I would like to have a moment to

consider that.

THE COURT: All right.

MR. GLIKO: Your Honor, I don't think I have any other questions of the witness.

THE COURT: Defense may cross-examine.

CROSS-EXAMINATION

BY MR. BOLAND:

Q Mr. Lively, would you like a glass of water?

A No. I'm fine, sir. Thank you.

Q You recall, do you not, giving testimony under oath in the court below in April?

A Yes, sir, I do.

Q Have you had a chance to refresh your recollection about that testimony prior to testifying here today?

A No. I've seen no transcript nor read a transcript of it.

Q You testified under oath, did you not, that the PBT results and the Intoxilyzer 5000 results may be comparable only in clinical conditions; isn't that true?

A On a one-to-one basis, that is correct, yes.

Q And clinical conditions does not include field tests where the policeman has the driver out on the side of the road; isn't that true?

A They would be laboratory tests, yes, sir.

Q Does this particular Alco-Sensor III have a printout capability, to your knowledge?

A It can be designed to be as such. It can be hooked up with a printer.

Q Do you know of your own knowledge whether the Alco-Sensor III that's the subject of this matter had that capability at the time of the arrest?

A The Alco-Sensor III ended up --

Q A yes or no would suffice. And if you want to elaborate, you may. Do you know of your own knowledge?

A Would you repeat the question, please.

MR. BOLAND: Betty, would you repeat the question for the witness.

(WHEREUPON, the following question was read back by the court reporter: Do you know of your own knowledge whether the Alco-Sensor III that's the subject of this matter had that

capability at the time of the arrest?)

THE WITNESS: It does not, no, sir.

Q (By Mr. Boland) And the manufacturer makes that capability available to the purchasers of this machine; isn't that true?

A There is an option available for that, yes, sir.

Q And if that printout is available, there is a writing that is memorialized at the time of the reading; isn't that true?

A That is correct.

Q Something the officer would have had in his hand and could be a permanent part of the file; isn't that true?

A That is correct.

Q Sir, when was the last time you obtained anything of value, money, plane tickets, per diem, meals, anything of value from the company that manufacturers this Alco-Sensor III?

A From the Intoximeter, Incorporated, never, sir. No, I will take that back. They did provide transportation for myself and my associate to attend a factory training session in 1994.

Q Is that the one in Hawaii?

A No, sir.

aware of in this state where it was the alcohol concentration, but it was part of the testimony of what the officer saw, observed and did. That was my understanding and my function at that particular time.

As I come to understand, apparently, I am in error as far as, or not in error, but in difference between what I consider probable cause and the courts considering evidence that can only be used in a probable cause hearing as probable cause. Does that make sense? Because it confuses me.

Q Probable cause is a legal term and a legal concept, wouldn't you agree?

A I agree. And that's I think where the confusion has occurred, because I have to attempt to write a rule without me myself being, as you've pointed out, a legal expert.

Q One of the shortcomings of this fuel cell device is its inability to differentiate between certain alcohols; isn't that true?

A It will read ethanol and methanol relatively the same. There are some variations between, but it would still react, yes, sir.

Q Do you know of your own knowledge when

recently the Alco-Sensor III, and then the last product of that particular generation is the Alco-Sensor III large display, which is the one I believe that your jurisdiction uses.

Q The Alco-Sensor IV is marketed by the company that makes it as an improved model, doesn't it?

A Oh, absolutely. If you look at the distinction of the Alco --

MR. BOLAND: Your Honor, I would ask the answer be stricken, the rest of the answer. I asked the question and then he launched into yet another epistle.

THE COURT: Sustained.

Q (By Mr. Boland) Mr. Fort, at page 17 of your newsletter, you write, do you not, "The results of fuel cell tests taken during controlled alcohol studies compare very favorably with venous blood alcohol results taken at the same time. In fact, fuel cell results at low alcohol concentrations correlate to blood alcohol results more closely than breath alcohol results taken with infrared devices. The results of tests taken in actual field investigations show a broader range of variance."

A That's the two charts --

Q That's your --

A -- that are on that beige --

Q Those are your sentences; isn't that true?

A Yes. And that's also correct.

Q You go on, do you not, to say that the results of the field tests can be influenced by physiological, instrumental and/or operator induced factors including -- and you list them, do you not -- "Physiological: Time of drinking. Inadequate sample. Mouth alcohol or regurgitation of recently consumed alcohol.

"Instrumental: Radio frequency - some police radios can interfere with the display. Using an instrument that is not calibrated accurately. Temperature of the environment. Type of fuel cell device being used (age/manufacturer)."

And your third category of field test variance is operator induced. He sampled too quickly. The sampling was done when the subject does not have his lips tightly around the mouthpiece and outside air is drawn into the fuel cell.

Letting up on the red button or recording

a result --

A Read. Letting up on the read button.

Q Thank you. Read button. I'm glad you have it memorized.

Or recording a result before the fuel cell reaction is complete.

"Using the same mouthpiece for multiple tests.

"Using a mouthpiece not designed for that specific device.

"Creating back pressure either by manipulation or using the wrong mouthpiece."

And finally, "Recording the result incorrectly."

Those are the lists of field variants that cause field tests to vary significantly from controlled tests; isn't that true?

A Those are some of the factors that I've noted. And there may well be others as well, yes, sir.

Q Now, back to Defendant's Exhibit No. 1 for just a moment. On page 3 of this exhibit, these again are the -- what I call the questions Mr. Gliko sent to you. He has described quote, "Criteria for field use. Eight steps."

for probable cause. This word "only" is kind of a sticky wicket, isn't it?

MR. GLIKO: Well, Your Honor, I submitted a brief to you today which you said you would look at.

THE COURT: I'll look at it.

MR. GLIKO: Informal. And it's our argument that this rule is contrary to the statutes and rules of evidence and is therefore void.

THE COURT: Would you agree that even your witness from California had listed a whole laundry list of problems that could arise with this test? Just, for example, temperature.

MR. GLIKO: No question, Your Honor, that's --

THE COURT: I'm looking for them right now because I --

MR. GLIKO: We don't dispute, Your Honor, there are --

THE COURT: Where are they?

MR. BOLAND: Near the end of the article, Your Honor.

THE COURT: Where?

MR. BOLAND: Near the end of the article.

THE COURT: Near the end of the article.

MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 1-20-97

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| SUE BARTLETT | ✓ | | |
| AL BISHOP | ✓ | | |
| STEVE DOHERTY | ✓ | | |
| SHARON ESTRADA | ✓ | | |
| MIKE HALLIGAN | ✓ | | |
| RIC HOLDEN | ✓ | | |
| REINY JABS | ✓ | | |
| WALT MC NUTT | ✓ | | |
| LORENTS GROSFIELD, VICE CHAIRMAN | ✓ | | |
| BRUCE CRIPPEN, CHAIRMAN | ✓ | | |
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Amendments to Senate Bill No. 106
First Reading Copy

For the Committee on Judiciary

Prepared by Valencia Lane
January 20, 1997

1. Title, line 15.
Following: "SECTIONS"
Insert: "61-5-212,"
Following: "61-8-402,"
Insert: "61-8-403,"

2. Page 1, following line 19.
Insert: "**Section 1.** Section 61-5-212, MCA, is amended to read:
"**61-5-212. Driving while license suspended or revoked -- penalty -- seizure of vehicle or rendering vehicle inoperable.** (1) A person who drives a motor vehicle or commercial motor vehicle on any public highway of this state at a time when the person's privilege to do so is suspended or revoked in this state or any other state is guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than 2 days or more than 6 months and may be fined not more than $500.

(2) The department upon receiving a record of the conviction of any person under this section upon a charge of driving a vehicle while the person's driver's license was suspended or revoked shall extend the period of suspension or revocation for an additional like period.

(3) The vehicle owned and operated at the time of an offense under this section by a person whose driver's license is suspended or revoked for violating the provisions of 61-8-401, 61-8-402~~(5)~~, 61-8-406, 61-8-409, or 61-8-410 must, upon a person's first conviction, be seized or rendered inoperable by the county sheriff of the convicted person's county of residence for a period of 30 days.

(4) The sentencing court shall order the action provided for under subsection (3) and shall specify the date on which the vehicle is to be returned or again rendered operable. The vehicle must be seized or rendered inoperable by the sheriff within 10 days after the conviction.

(5) A convicted person is responsible for all costs associated with actions taken under subsection (3). Joint ownership of the vehicle with another person does not prohibit the actions required by subsection (3) unless the sentencing court determines that those actions would constitute an extreme hardship on a joint owner who is determined to be without fault.

(6) A court may not suspend or defer imposition of penalties provided by this section.""
Renumber: subsequent sections

3. Page 3, lines 3 and 4.
Following: "body" on line 3
Strike: remainder of line 3 through "drugs." on line 4
Insert: ". (2)(a)"

Renumber: subsequent subsections

4. Page 3, line 5.
Strike: "who"
Insert: "when:
(i) the officer"

5. Page 3, line 7.
Following: "two"
Insert: "and the person has been placed under arrest for a violation of 61-8-401;
(ii) the person is under the age of 21 and has been placed under arrest for a violation of 61-8-410; or
(iii) the officer has probable cause to believe that the person was driving or in actual physical control of a vehicle in violation of 61-8-401 and the person has been involved in a motor vehicle accident or collision resulting in property damage, bodily injury, or death"

6. Page 3, line 7.
Following: "."
Insert: "(b)"
Following: "arresting"
Insert: "or investigating"

7. Page 3, line 14.
Strike: "arresting"

8. Page 3, line 15.
Strike: "(1)"
Insert: "(2)"

9. Page 3, lines 17 through 20.
Following: "law" on line 17
Strike: remainder of line 17 through "noting" on line 20
Insert: "stating which of the conditions set forth in subsection (2)(a) provides the basis for the testing request and confirming"

10. Page 3, line 22.
Strike: "(5)"
Insert: "(6)"

11. Page 4, line 16.
Insert: "**Section 4.** Section 61-8-403, MCA, is amended to read:
"**61-8-403. Right of appeal to court.** (1) Within 30 days after notice of the right to a hearing has been given by a peace officer, a person may file a petition to challenge the license suspension or revocation in the district court in the county where the person resides or in the county where the arrest was made.
(2) The court has jurisdiction and shall set the matter for hearing. The court shall give at least 10 days' written notice of the hearing to the county attorney of the county where the appeal is filed and to the city attorney if the incident leading to the

suspension or revocation resulted in a charge filed in a city or municipal court. The county attorney or city attorney may represent the state. If the county attorney and the city attorney cannot agree on who will represent the state, the county attorney shall represent the state.

(3) Upon request of the petitioner, the court may order the department to return the seized license or issue a stay of the suspension or revocation action pending the hearing.

(4) (a) The court shall take testimony and examine the facts of the case, except that the issues are limited to whether:

(i) a peace officer had reasonable grounds to believe that the person had been driving or was in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person was placed under arrest for violation of 61-8-401;

(ii) the person ~~was placed under arrest; and~~ is under the age of 21 and was placed under arrest for a violation of 61-8-410;

(iii) the officer had probable cause to believe that the person was driving or in actual physical control of a vehicle in violation of 61-8-401 and the person was involved in a motor vehicle accident or collision resulting in property damage, bodily injury, or death; and

~~(iii)~~(iv) the person refused to submit to ~~the test or~~ one or more tests designated by the officer.

(b) ~~The~~ Based on the above issues and no others, the court shall determine whether the petitioner is entitled to a license or whether the petitioner's license is subject to suspension or revocation.

(5) This section does not grant a right of appeal to a state court if a driver's license is initially seized, suspended, or revoked pursuant to a tribal law or regulation that requires alcohol or drug testing of motor vehicle operators.""
Renumber: subsequent sections

12. Page 5, line 8.
Following: first "was"
Strike: "for alcohol and was"

13. Page 5, line 9.
Following: "or"
Strike: "if it was for drugs and was made by a person certified"
Insert: "by a person who has received training recognized"

14. Page 5, line 30.
Following: "~~urine~~."
Insert: "The peace officer may not unreasonably impede the person's right to obtain an independent blood test. The officer may, but has no duty to transport the person to a medical facility or otherwise assist the person in obtaining the test."

15. Page 7, line 9.
Strike: "(2) through (7)"
Insert: "(3) through (8)"

**SENATE STANDING COMMITTEE REPORT**


January 20, 1997

MR. PRESIDENT:
We, your committee on Judiciary having had under consideration SB 106 (first reading copy -- white), respectfully report that SB 106 be amended as follows and as so amended do pass.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

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Following: "law" on line 17
Strike: remainder of line 17 through "noting" on line 20
Insert: "stating which of the conditions set forth in subsection (2)(a) provides the basis for the testing request and confirming"

10. Page 3, line 22.
Strike: "(5)"
Insert: "(6)"

11. Page 4, line 16.
Insert: "**Section 4.** Section 61-8-403, MCA, is amended to read:

"**61-8-403. Right of appeal to court.** (1) Within 30 days after notice of the right to a hearing has been given by a peace officer, a person may file a petition to challenge the license suspension or revocation in the district court in the county where the person resides or in the county where the arrest was made.

(2) The court has jurisdiction and shall set the matter for hearing. The court shall give at least 10 days' written notice of the hearing to the county attorney of the county where the appeal is filed and to the city attorney if the incident leading to the suspension or revocation resulted in a charge filed in a city or municipal court. The county attorney or city attorney may represent the state. If the county attorney and the city attorney cannot agree on who will represent the state, the county attorney shall represent the state.

(3) Upon request of the petitioner, the court may order the department to return the seized license or issue a stay of the suspension or revocation action pending the hearing.

(4) (a) The court shall take testimony and examine the facts of the case, except that the issues are limited to whether:

(i) a peace officer had reasonable grounds to believe that the person had been driving or was in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person was placed under arrest for violation of 61-8-401;

(ii) the person ~~was placed under arrest; and~~ is under the age of 21 and was placed under arrest for a violation of 61-8-410;

(iii) the officer had probable cause to believe that the person was driving or in actual physical control of a vehicle in violation of 61-8-401 and the person was involved in a motor vehicle accident or collision resulting in property damage, bodily injury, or death; and

~~(iii)~~(iv) the person refused to submit to ~~the test or~~ one or more tests designated by the officer.

(b) ~~The~~ Based on the above issues and no others, the court shall determine whether the petitioner is entitled to a license or whether the petitioner's license is subject to suspension or revocation.

(5) This section does not grant a right of appeal to a state court if a driver's license is initially seized, suspended, or revoked pursuant to a tribal law or regulation that requires

alcohol or drug testing of motor vehicle operators.""
Renumber: subsequent sections

12. Page 5, line 8.
Following: first "was"
Strike: "for alcohol and was"

13. Page 5, line 9.
Following: "or"
Strike: "if it was for drugs and was made by a person certified"
Insert: "by a person who has received training recognized"

14. Page 5, line 30.
Following: "~~urine~~."
Insert: "The peace officer may not unreasonably impede the person's right to obtain an independent blood test. The officer may but has no duty to transport the person to a medical facility or otherwise assist the person in obtaining the test."

15. Page 7, line 9.
Strike: "(2) through (7)"
Insert: "(3) through (8)"

-END-

**CRAIG REAP, Chief, Montana Highway Patrol**
*{Tape: 1; Side: A; Approx. Time Count: 10.3.}*

**RUSSELL HILL, Montana Trial Lawyers Association**
*{Tape: 1; Side: A; Approx. Time Count: 11.8.}*

Opponents' Testimony:

**BOB GILBERT, Montana Magistrates Association** **EXHIBIT 2**
*{Tape: 1; Side: a; Approx. Time Count: 12.7.}*

Informational Testimony: None

Questions From Committee Members and Responses:
*{Tape: 1; Side: A; Approx. Time Count: 20.2.}*

Closing by Sponsor: REP. ROD MARSHALL
*{Tape: 1; Side: A; Approx. Time Count: 21.7.}*

## HEARING ON HB 559

Opening Statement By Sponsor: **REP. DUANE GRIMES, HD 29**
*{Tape: 1; Side: A; Approx. Time Count: 23.8; Comments: Rep. Grimes introduced the bill.}*

Proponents' Testimony:

**BRENDA NORDLUND, Montana Department of Justice** **EXHIBITS 3 & 4**
*{Tape: 1; Side: a; Approx. Time Count: 25.3.}*

**GREGORY MOHR, DUI Task Force, Sidney**
*{Tape: 1; Side: A; Approx. Time Count: 36.2.}*

**MIKE RUPPERT, Boyd Andrew Treatment Center**
*{Tape: 1; Side: A; Approx. Time Count: 39.0.}*

Opponents' Testimony: **None**

Questions from Committee Members and Responses:
*{Tape: 1; Side: A; Approx. Time Count: 40.4; Comments: Questions and responses continued on Tape 1, Side B.}*

Closing by Sponsor: **Rep. Duane Grimes**
*{Tape: 1; Side: B; Approx. Time Count: 5.4.}*

## HEARING ON SB 106

Opening Statement by Sponsor: **SEN. FRED VAN VALKENBURG, SD 32**
*{Tape: 1; Side: B; Approx. Time Count: 7.0; Comments: Sen. Van Valkenburg introduced the bill.}*

Proponents' Testimony:

**BRENDA NORDLUND, Montana Department of Justice** **EXHIBIT 5**
*{Tape: 1; Side: B; Approx. Time Count: 9.7.}*

**MIKE MENAHAN, Lewis and Clark County Attorney's Office**
*{Tape: 1; Side: B; Approx. Time Count: 23.4.}*

**JERRY ARCHER, Billings Police Department**
*{Tape: 1; Side: B; Approx. Time Count: 28.5.}*

**CRAIG REAP, Montana Highway Patrol**
*{Tape: 1; Side: B; Approx. Time Count: 29.0.}*

**AUGUST BENTZ, Billings PD and Yellowstone County DUI Task Force**
*{Tape: 1; Side: B; Approx. Time Count: 30.0.}*

Opponents' Testimony: **None**

Questions from Committee Members and Responses:
*{Tape: 1; Side: B; Approx. Time Count: 31.4.}*

Close by Sponsor: **SEN. VAN VALKENBURG**
*{Tape: 2; Side: A; Approx. Time Count: .8.}*

## HEARING ON SB 222

Opening Statement by Sponsor: **SEN. BILL GLASER, SD 8**
*{Tape: 2; Side: A; Approx. Time Count: 5.5; Comments: Sen. Glaser introduced the bill.}*

Proponents' Testimony:

**HAROLD HANSER, DUI Task Force**
*{Tape: 2; Side: A; Approx. Time Count: 7.3.}*

**BRENDA NORDLUND, Montana Department of Justice** **EXHIBIT 6**
*{Tape: 2; Side: A; Approx. Time Count: 12.1.}*

**CRAIG REAP, Montana Highway Patrol**
*{Tape: 2; Side: A; Approx. Time Count: 21.6.}*

**AUGUST BENTZ, Billings PD and Yellowstone County DUI Task Force**
*{Tape: 2; Side: A; Approx. Time Count: 23.1.}*

Opponents' Testimony:

**RUSSELL HILL, Montana Trial Lawyers Association**
*{Tape: 2; Side: A; Approx. Time Count: 24.2.}*

**SCOTT CRICHTON, ACLU**
*{Tape: 2; Side: A; Approx. Time Count: 32.0.}*

HOUSE OF REPRESENTATIVES

House Select COMMITTEE ON CORRECTIONS

ROLL CALL DATE 3/4/97

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| | | | |
| Rep. Ernest Bergsagel, Chairman | ✓ | | |
| Rep. "Red" Menahan, Vice Chairman | ✓ | | |
| Rep. Gary Feland | ✓ | | |
| Rep. Royal Johnson | ✓ | | |
| Rep. Betty Lou Kasten | ✓ | | |
| Rep. Matt McCann | ✓ | | |
| Rep. Dan McGee | ✓ | | |
| Rep. Steve Vick | ✓ | | |
| Rep. Diana Wyatt | ✓ | | |
| | | | |
| Jon. Christiaens | ✓ | | |
| Ken. Jake | ✓ | | |
| Ken. Lubbood | ✓ | | |
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# MONTANA HOUSE OF REPRESENTATIVES
# SELECT COMMITTEE ON CORRECTIONS
# VISITOR REGISTER

**DATE: March 4, 1997**

**BILL NUMBER: SB 106** **SPONSOR: VAN VALKENBURG**

**Please indicate your position below:**
**PROPONENT (P)** **OPPONENT (O)** **INFORMATIONAL (I)**

***PLEASE PRINT***

| PLEASE CIRCLE | NAME | ADDRESS | REPRESENTING |
|---|---|---|---|
| (P) O I | C Linn/& R. Brooks | DUI Task Force | Billings |
| (P) O I | Ken Cooper Pmoke | Sidney | DUI Task Force |
| (P) O I | Harold Hanan | Billings | DUI Task Force |
| (P) O I | Diane Stanley | Billings | DUI Task Force |
| (P) O I | August Bertz | Billings | DUI Task Force + Bldg Police |
| (P) O I | Brenda Nordlund | Helena | MT Dept of Justice |
| (P) O I | Jerry Archer | Billings | Billings Police |
| P O (I) | Mary Craigle | Helena | Dept of Corrections |
| (P) O I | Phil Lively | MSLA | DU Forensic Science |
| (P) O I | Mike Ruppert | Helena | CD Task Force |
| P O I | Craig Reap | MHP | Helena |
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**PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.**

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**SB 106**
*{Tape: 2; Side: B; Approx. Time Count: 35.6.}*

**MOTION/VOTE: REP. MENAHAN MOVED SB 106 BE CONCURRED IN. Motion carried 9-1 with SEN. SWYSGOOD voting no.**

**SB 222**
*{Tape: 2; Side: B; Approx. Time Count: 37.6.}*

**MOTION: REP. MENAHAN MOVED SB 222 BE CONCURRED IN.**

DISCUSSION

**SUBSTITUTE MOTION: REP. McGEE MOVED SB 222 BE TABLED.**
*{Tape: 2; Side: B; Approx. Time Count: 39.5.}*

DISCUSSION

**SUBSTITUTE MOTION WITHDRAWN.**
*{Tape: 3; Side: A; Approx. Time Count: 3.1.}*

**VOTE: Motion carried 7-3 with REP. VICK, REP. McGEE and REP. KASTEN voting no.**

**HB 559**
*{Tape: 3; Side: A; Approx. Time Count: 4.0.}*

**MOTION: REP. KASTEN MOVED HB 559 DO PASS.**
**MOTION/VOTE: REP. KASTEN MOVED THE AMENDMENTS AS REVISED BY BRENDA NORDLUND. HB 055901. Motion carried 10-0.**

**MOTION/VOTE: REP. KASTEN MOVED HB 559 DO PASS AS AMENDED. Motion carried 8-2 with REP. WYATT and SEN. SWYSGOOD voting no.**

**SB 303**
*{Tape: 3; Side: A; Approx. Time Count: 5.9.}*

**MOTION\VOTE: REP. MENAHAN MOVED SB 303 BE CONCURRED IN. Motion carried 10-0.**

**COMMITTEE BUSINESS**
*{Tape: 3; Side: A; Approx. Time Count: 6.5.}*

# HOUSE STANDING COMMITTEE REPORT

March 10, 1997



Mr. Speaker: We, the committee on **Select Committee on Corrections** report that **Senate Bill 106** (third reading copy -- blue) **be concurred in.**

Signed: _____
*Ernest Bergsagel, Chair*

**Carried by: Rep. McGee**

3-10-97

Committee Vote:
Yes 9, No 1.

521424SC.Hgd

HOUSE OF REPRESENTATIVES

House Select COMMITTEE ON CORRECTIONS

ROLL CALL DATE 3/7/97

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| | | | |
| Rep. Ernest Bergsagel, Chairman | ✓ | | |
| Rep. "Red" Menahan, Vice Chairman | ✓ | | |
| Rep. Gary Feland | | | ✓ |
| Rep. Royal Johnson | ✓ | | |
| Rep. Betty Lou Kasten | ✓ | | |
| Rep. Matt McCann | ✓ | | |
| Rep. Dan McGee | ✓ | | |
| Rep. Steve Vick | ✓ | | |
| Rep. Diana Wyatt | ✓ | | |
| | | | |
| Sen. Gage | ✓ | | |
| Sen. Swackhood | ✓ | | |
| Sen. Chris Briggs | | | ✓ |
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